

Reviewing Congressionally Created Remedies for Excessiveness

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Federal courts have struggled with how to review whether a legislatively created remedy, awarded within monetary ranges specified by Congress, is excessive under nonconstitutional or constitutional standards. This Article attempts to solve the puzzle of reviewing legislatively created remedies within congressional boundaries by employing a broader frame of reference than has been used by courts and commentators. Drawing on precedents involving not only review of legislatively created remedies, but also review of statutory fines payable to the government and criminal sanctions, the Article suggests guidelines for nonconstitutional and constitutional review of legislatively created remedies.

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I. INTRODUCTION

Highly publicized cases of late have brought to the fore questions of the proper intersection of authority between Congress, judges, and juries with respect to remedies.¹ When Congress creates a statutory cause of action, it often creates an accompanying legislative monetary remedy—distinct from the judicially created remedies of compensatory damages, restitution, or punitive damages. To its legislatively created remedies, Congress typically attaches monetary boundaries. An example is “statutory damages” for infringement under the Copyright Act.² In lieu of actual damages and defendant’s profits, the Act permits the trial decisionmaker to award a “just” amount of statutory damages within prescribed monetary ranges.³

In two recent lawsuits, juries awarded substantial statutory damages under the Copyright Act against individuals found to have illegally downloaded and shared songs. Three federal juries in Minnesota awarded \$222,000, \$1.92 million, and \$1.5 million, respectively, in statutory damages against Jammie Thomas-Rasset, who had infringed twenty-four songs.⁴ A federal jury in Boston

¹ See, e.g., Assoc. Press, *Student’s \$675,000 Fine Restored for Downloading*, WALL ST. J., Sept. 20, 2011, at B10; Joe Barrett, *Don’t Stop Believing in Risk of Song Sharing*, WALL ST. J., Nov. 5, 2010, at A2; Dave Itzkoff, *\$1.92 Million Fine for Music Piracy*, N.Y. TIMES, June 20, 2009, at C2; John Schwartz, *Judge Reduces Fine in Downloading Case*, N.Y. TIMES, July 13, 2010, at C2.

² 17 U.S.C. § 504(c) (2006); see also *infra* notes 22–23 and accompanying text. For arguments that courts have misinterpreted the Copyright Act and awarded excessive copyright statutory damages, see, for example, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 492–97 (2009).

³ 17 U.S.C. § 504(c).

⁴ In the litigation against Thomas-Rasset, the first jury awarded \$222,000 in statutory damages, but the district judge ordered a new trial because he believed he had given an erroneous jury instruction. *Capitol Records, Inc. v. Thomas (Thomas-Rasset I)*, 579 F. Supp. 2d 1210, 1213, 1226–27 (D. Minn. 2008). The second jury awarded \$1.92 million in statutory damages, but the district judge found that amount excessive under

awarded \$675,000 in statutory damages against Joel Tenenbaum, a university student who had infringed thirty copyrighted recordings.⁵ The district judges in both lawsuits found that the defendants had not profited appreciably from their illegal conduct and had caused only slight economic losses to the plaintiff record companies.⁶

Perhaps as a matter of policy, Congress should amend the Copyright Act so that large awards such as those in *Thomas-Rasset* and *Tenenbaum* are not possible in similar circumstances.⁷ For the courts in these two lawsuits,

nonconstitutional review. *Capitol Records, Inc. v. Thomas-Rasset (Thomas-Rasset II)*, 680 F. Supp. 2d 1045, 1053–54 (D. Minn. 2010). The third jury awarded \$1.5 million in statutory damages, but the district judge found that amount excessive under due process. *Capitol Records, Inc. v. Thomas-Rasset (Thomas-Rasset III)*, 799 F. Supp. 2d 999, 1011 (D. Minn. 2011). On appeal after the district court’s decision in *Thomas-Rasset III*, the plaintiff record companies for tactical reasons requested reinstatement of the first jury’s award of \$222,000. *Capitol Records, Inc. v. Thomas-Rasset*, Nos. 11-2820, 11-2858, 2012 WL 3930988, at *4–5 (8th Cir. Sept. 11, 2012). The Eighth Circuit reinstated the \$222,000 award, holding that the amount was not excessive under due process. *Id.* at *7–10.

⁵ *Sony BMG Music Entm’t v. Tenenbaum (Tenenbaum I)*, 721 F. Supp. 2d 85, 87 (D. Mass. 2010) (finding jury’s award to have been excessive under due process), *vacated*, 660 F.3d 487 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012), *remanded* to No. 07-11446-RWZ, 2012 WL 3639053, slip op. at *6 (D. Mass. Aug. 23, 2012) (concluding jury’s award was not excessive on either nonconstitutional or constitutional grounds). Tenenbaum has filed a notice of appeal. Defendant’s Notice of Appeal, *Tenenbaum II*, No. 1:07-cv-11446-RWZ, 2012 WL 3639053 (D. Mass. Sept. 17, 2012).

⁶ *Thomas-Rasset III*, 799 F. Supp. 2d at 1007–09; *Thomas-Rasset II*, 680 F. Supp. 2d at 1053; *Tenenbaum I*, 721 F. Supp. 2d at 87.

⁷ Some of the opinions in the *Tenenbaum* and *Thomas-Rasset* lawsuits suggested that Congress should consider whether to amend the Copyright Act in light of the substantial awards possible in peer-to-peer file-sharing cases. *See Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012) (“We comment that this case raises concerns about application of the Copyright Act which Congress may wish to examine.”); *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (D. Mass. 2009) (“[The court] urges—no implores—Congress to amend the statute to reflect the realities of file sharing. There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood.”); *Thomas-Rasset I*, 579 F. Supp. 2d at 1227 (“The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court.”).

In 2008, the recording industry announced that it had abandoned its legal strategy of suing people for illegally downloading music; it is now working with internet service providers and colleges and universities to further compliance with copyright law. *See Sarah McBride & Ethan Smith, Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, B7 (discussing plans of Recording Industry Association of America to work with internet service providers to deter illegal downloading); Simmi Aujla, *New Federal Rules on Internet Piracy Will Not Add a Heavy Burden*, *College Officials Say*, CHRON. OF HIGHER EDUC. (Oct. 28, 2009), available at <http://chronicle.com/article/New-Federal-Rules-on-Internet/48964/> (discussing federal regulations issued under the Higher Education Opportunity Act of 2008 that require colleges and universities to have written plans for

however, a more immediate matter has been presented—should the juries' awards be set aside as excessive? The lawsuits thus far have produced several court opinions addressing nonconstitutional and constitutional review for excessiveness.⁸ In *Thomas-Rasset*, the district court deemed the second jury's award of \$1.92 million excessive on nonconstitutional grounds⁹ and the third jury's award of \$1.5 million excessive under due process.¹⁰ The appellate court, reviewing the first jury's award of \$222,000, determined that the amount did not violate due process.¹¹ In *Tenenbaum*, one district judge deemed the jury's \$675,000 award excessive under due process,¹² but on remand, a different district judge decided that the jury's award was not excessive on nonconstitutional grounds or under due process.¹³

The *Thomas-Rasset* and *Tenenbaum* lawsuits present an important question that transcends the context of copyright statutory damages—to what extent may courts review particular awards of congressionally created monetary remedies? I suggest that a critical distinction exists, for purposes of both nonconstitutional and constitutional excessiveness review, between monetary remedies created by the common law and monetary remedies created by Congress. Because of the judicial deference due to Congress when it has created the cause of action, the remedy, and the monetary boundaries of the remedy, excessiveness review of legislatively created remedies should be more circumscribed than excessiveness review of judicially created remedies.¹⁴

Nonconstitutional review of an award of a congressionally created remedy should be limited to whether the award is consistent with the relevant statutory language; a reviewing court should not otherwise have the power to set aside the award as excessive. If Congress has not specified in the statute any factors that should guide the selection of an amount within the monetary range, then no judicial review as to amount should occur because Congress has granted complete discretion to the trial decisionmaker to choose an amount within the

deterring illegal file sharing, including educating their network users about copyright law, and to offer legal alternatives to downloading protected content).

⁸ See *infra* Part II.A.

⁹ *Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54.

¹⁰ *Thomas-Rasset III*, 799 F. Supp. 2d at 1011.

¹¹ *Capitol Records, Inc. v. Thomas-Rasset*, Nos. 11-2820, 11-2858, 2012 WL 3930988, at *7–10 (8th Cir. Sept. 11, 2012). On appeal after the district court's decision in *Thomas-Rasset III*, the plaintiff record companies for tactical reasons requested reinstatement of the first jury's award of \$222,000. *Id.* at *4–5; see also *infra* notes 48–50 and accompanying text.

¹² *Tenenbaum I*, 721 F. Supp. 2d 85, 116 (D. Mass. 2010).

¹³ *Tenenbaum II*, No. 07-11446-RWZ, 2012 WL 3639053, slip op. at *7–10 (D. Mass. Aug. 23, 2012).

¹⁴ It is conceivable, although perhaps politically unlikely, that Congress might choose to codify a pre-existing common law cause of action and create an accompanying remedy that would completely displace compensatory damages or other common law remedies. My focus in this Article, however, is on legislatively created remedies for legislatively created causes of action.

range. If Congress instead has created statutory factors to guide the choice of amount within the range, then a reviewing court may consider whether the award amount is unreasonable in light of those factors. This approach to nonconstitutional review should apply whether the trial decisionmaker is the judge or the jury, and it parallels how federal courts have reviewed the severity of criminal sanctions imposed within statutory ranges.

With respect to constitutional review, the Supreme Court has held that a statutory provision creating a legislative remedy violates due process only if the maximum statutory amount is “wholly disproportionate to the offense and obviously unreasonable.”¹⁵ Lower federal courts should apply this due process standard leniently, just as those courts have leniently applied, under the Excessive Fines Clause of the Eighth Amendment,¹⁶ a practically identical standard to civil and criminal penalties payable to the government.¹⁷ I reject the position advanced by some commentators¹⁸ and courts¹⁹ that Supreme Court doctrine on due process review of the amount of uncapped punitive damages should apply also to bounded legislatively created remedies.²⁰

Under the proposals for nonconstitutional and constitutional review developed here, the jury awards in *Thomas-Rasset* and *Tenenbaum* were not excessive. The amounts of the awards pale in comparison to large civil and criminal fines and lengthy prison sentences that federal courts have routinely upheld against nonconstitutional and constitutional challenges.²¹ The

¹⁵ *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919); *see also infra* Part IV.A.

¹⁶ U.S. CONST. amend. VIII (“Excessive bail shall not be required, *nor excessive fines imposed*, nor cruel and unusual punishments inflicted.” (emphasis added)); *see also infra* Part IV.B.

¹⁷ *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (adopting a “grossly disproportionate to the offense” standard under the Excessive Fines Clause); *see also infra* Part IV.B.

¹⁸ For arguments that Supreme Court doctrine on due process review of the amount of punitive damages should also apply to statutory damages, *see*, for example, Blaine Evanson, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL’Y 601 (2005) (statutory damages generally); Samuelson & Wheatland, *supra* note 2, at 464–97 (copyright statutory damages); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103 (2009) (statutory damages in class actions); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 536–59 (2004) (copyright statutory damages). For an argument that Supreme Court doctrine on due process review of punitive damages should not apply to statutory damages, *see* Daniel R. LeCours, Note, *Steering Clear of the “Road to Nowhere”: Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327 (2010).

¹⁹ *See, e.g., Tenenbaum I*, 721 F. Supp. 2d 85, 101 (D. Mass. 2010).

²⁰ *See infra* Part IV.C.

²¹ *See infra* Parts III.B, IV.B, IV.D; *see also* *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (concluding that a sentence of life in prison with no possibility of parole for fifty years for offender under state “three-strikes” law, when offender’s third and fourth offenses

comparison is apt because bounded, legislatively created remedies have an important similarity to bounded, monetary fines payable to the government and to statutory ranges for imprisonment. In all three contexts, Congress creates the remedy or sanction and a maximum amount or length of time that may be imposed. The legislature's province in defining statutory offenses and creating and limiting remedies and sanctions for those offenses has deep bearing on the proper level of nonconstitutional and constitutional review.

I use *Thomas-Rasset* and *Tenenbaum* as a springboard for discussion, but my proposals for nonconstitutional and constitutional review apply generally to congressionally created monetary remedies. Part II details the puzzle of reviewing awards within congressional boundaries. It employs *Thomas-Rasset* and *Tenenbaum* to illustrate questions of nonconstitutional and constitutional review that arise with respect to legislatively created monetary remedies, and it describes the variety of such remedies and how those remedies differ from judicially created monetary remedies. Part III delves into nonconstitutional review of legislatively created remedies, while Part IV explores constitutional review.

II. THE PUZZLE OF REVIEWING AWARDS WITHIN CONGRESSIONAL BOUNDARIES

To identify, in concrete terms, various issues of nonconstitutional and constitutional review with respect to legislatively created monetary remedies, I will use the *Thomas-Rasset* and *Tenenbaum* lawsuits as examples. While these two lawsuits involved copyright statutory damages, there are many types of legislatively created remedies. I will thus outline several categories of legislative monetary remedies and how they differ from judicially created remedies.

A. *The Examples of Thomas-Rasset and Tenenbaum*

To highlight the review issues that *Thomas-Rasset* and *Tenenbaum* raise, we must first briefly consider the definition of "statutory damages" under the Copyright Act. Under the current version of the Act, a prevailing plaintiff, at any time prior to final judgment, may "recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just."²² The Copyright Act adjusts this range depending on the infringer's state of mind. If the infringement was

were theft of nine video tapes worth a total of \$153, did not violate Eighth Amendment Cruel and Unusual Punishment Clause); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (concluding that indeterminate term of life imprisonment for offender under state "three-strikes" law, when third offense was theft of golf clubs worth approximately \$1,200, did not violate Eighth Amendment Cruel and Unusual Punishment Clause).

²² 17 U.S.C. § 504(c)(1) (2006).

“willful[.],” the top of the statutory range increases to \$150,000; if the infringement was innocent, the bottom of the statutory range decreases to \$200.²³

In *Thomas-Rasset*, the plaintiff record companies opted for statutory damages rather than actual damages and profits. For various reasons, three jury trials were held. In the first trial, the district judge instructed the jury that making sound recordings available for distribution on a peer-to-peer online network, even in the absence of proof of actual distribution, violates the copyright owner’s exclusive rights of distribution.²⁴ The jury found Thomas-Rasset to have willfully infringed twenty-four recordings, and it awarded \$9,250 per work infringed, for a total of \$222,000 in statutory damages.²⁵ The judge subsequently ordered a new trial, reasoning that his jury instruction had been erroneous as a matter of law.²⁶

In the second trial, the jury awarded the record companies \$80,000 per song for a total of \$1.92 million,²⁷ after being instructed that it could consider factors such as the plaintiff’s loss, the defendant’s gain, the need for deterrence, and the defendant’s state of mind.²⁸ The district judge found the second jury’s award to be excessive²⁹ under the common law standard that a jury’s award of damages may be set aside when it is “so grossly excessive as to shock the conscience of the court.”³⁰ The cases that the judge cited for this standard of review involved compensatory damages, not congressionally created remedies.³¹ The judge acknowledged that Congress had chosen the range for copyright statutory damages, and that the jury’s award was within that range, but he asserted (incorrectly, as I will show) that “there is no authority for Plaintiffs’ assertion that the Court does not have the power to remit an award of statutory

²³ If the “infringement was committed willfully,” the court may increase the amount up to \$150,000. *Id.* § 504(c)(2). If the court finds that the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” the court may reduce the amount per infringed work to no less than \$200. *Id.*

²⁴ *Thomas-Rasset I*, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008).

²⁵ *Id.* at 1212–13.

²⁶ *Id.* at 1216–27.

²⁷ *Thomas-Rasset II*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

²⁸ *Id.* at 1053 (summarizing its instructions to the jury as indicating that “factors other than the damages caused and gains obtained by the defendant’s infringement are relevant to the decision of the proper amount of statutory damages” and that “[f]acts that go to the deterrence aspect of statutory damages . . . are also relevant”).

²⁹ *Id.* at 1050–54.

³⁰ *Id.* at 1050.

³¹ *Id.* The court cited *Taylor v. Otter Tail Corp.*, 484 F.3d 1016 (8th Cir. 2007) (involving compensatory damages for personal injuries); *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752 (8th Cir. 2003) (involving compensatory damages for employment discrimination); *Schaefer v. Spider Staging Corp.*, 275 F.3d 735 (8th Cir. 2002) (involving compensatory damages for personal injuries).

damages.”³² After characterizing the jury’s award as “shocking,”³³ the judge determined that the maximum amount the jury could properly have awarded per work infringed was \$2,250—three times the statutory minimum of \$750.³⁴ The judge reached this number by citing several statutes that allow courts to multiply actual damages or other awards up to three times.³⁵ He gave the record companies the choice of accepting a remittitur to \$54,000 or proceeding to a new trial on damages.³⁶

The record companies rejected the remittitur, and the case was tried again in the fall of 2010, solely on the issue of damages.³⁷ The new jury awarded \$62,500 in statutory damages per song infringed, for a total of \$1.5 million.³⁸ The district judge found the \$1.5 million award excessive under due process, emphasizing that the defendant was “an individual consumer, of limited means, acting with no attempt to profit.”³⁹ He evaluated the award under *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*,⁴⁰ a 1919 Supreme Court decision that involved due process review of a railroad rate statute authorizing passengers who were overcharged to recover an amount within the prescribed statutory range.⁴¹ The district judge in *Thomas-Rasset* expressly rejected applying a much newer body of doctrine created by the Supreme Court to evaluate whether a punitive damages award is so grossly excessive as to violate due process.⁴² In *BMW of North America, Inc. v. Gore*⁴³ and *State Farm Mutual Auto Insurance Co. v. Campbell*,⁴⁴ the Supreme Court addressed large punitive damages awards—ungoverned by any statutory limits on amount—and developed and applied several guidelines to assess whether such awards are unconstitutionally excessive.⁴⁵

In the *Thomas-Rasset* constitutional review opinion, the district judge referenced the trebling statutes cited in the nonconstitutional review opinion and determined that the maximum amount permitted under due process was \$2,250 per infringed work.⁴⁶ He then amended the judgment to reduce the statutory

³² *Thomas-Rasset II*, 680 F. Supp. 2d at 1051; see also *infra* notes 129–40, 145–48, 164–172 and accompanying text.

³³ *Thomas-Rasset II*, 680 F. Supp. 2d at 1054.

³⁴ *Id.* at 1056.

³⁵ *Id.* at 1056–57 (citations omitted).

³⁶ *Id.* at 1061.

³⁷ *Thomas-Rasset III*, 799 F. Supp. 2d 999, 1003 (D. Minn. 2011).

³⁸ *Id.*

³⁹ See *id.* at 1011.

⁴⁰ 251 U.S. 63 (1919); see also *infra* notes 202–17 and accompanying text.

⁴¹ *Williams*, 251 U.S. at 64.

⁴² *Thomas-Rasset III*, 799 F. Supp. 2d at 1004–06.

⁴³ 517 U.S. 559 (1996).

⁴⁴ 538 U.S. 408 (2003).

⁴⁵ See *infra* Part IV.C.1.

⁴⁶ *Thomas-Rasset III*, 799 F. Supp. 2d at 1001.

damages award accordingly, without giving the record companies the option of a new trial.⁴⁷

On appeal before the United States Court of Appeals for the Eighth Circuit, the record companies in *Thomas-Rasset* sought reinstatement of the first verdict for \$222,000, rather than reinstatement of the much larger third verdict.⁴⁸ This choice was rooted in the record companies' desire for an appellate ruling that the Copyright Act prohibits a person from making copyrighted works available for distribution without permission from the copyright holder.⁴⁹ Accordingly, the record companies argued that the district judge had properly instructed the first jury on the law and that the first jury's verdict should stand.⁵⁰ In her cross-appeal, Thomas-Rasset acquiesced in the record companies' choice to seek reinstatement of the first verdict rather than the third verdict, but she argued that the first verdict of \$222,000 nevertheless was excessive under due process.⁵¹

Asserting that it did not need to decide the substantive law issue,⁵² the Eighth Circuit reinstated the \$222,000 award as not excessive under due process.⁵³ The appellate court assumed that *Williams* applied to the excessiveness inquiry, and it explicitly rejected the defendant's invocation of *Gore* and *Campbell*.⁵⁴ Moreover, the appellate court asserted that the aggregate amount for multiple statutory violations, and not just the amount per violation, is relevant to the *Williams* due process inquiry.⁵⁵ In deciding that the \$222,000 award was not excessive under due process, the Eighth Circuit criticized the district judge for "effectively impos[ing] a treble damages limit" as a constitutional rule.⁵⁶

In *Tenenbaum*, the evidence showed that the defendant, while a college and graduate student, had illegally downloaded and distributed on peer-to-peer networks thousands of copyrighted music recordings, and that he continued to engage in this activity even after receiving a letter from the recording companies notifying him that they had detected his illegal infringement.⁵⁷ The recording companies sued, alleging willful copyright infringement of only thirty of the recordings.⁵⁸ The district judge who presided at trial, Nancy Gertner, granted judgment as a matter of law against Tenenbaum on infringement, and

⁴⁷ *Id.* at 1016.

⁴⁸ *Capitol Records, Inc. v. Thomas-Rasset*, Nos. 11-2820, 11-2858, 2012 WL 3930988, at *1 (8th Cir. Sept. 11, 2012).

⁴⁹ *Id.* at *1, *4-5.

⁵⁰ *Id.*

⁵¹ *Id.* at *5.

⁵² *Id.* at *1, *5-7.

⁵³ *Id.* at *7-10.

⁵⁴ *Thomas-Rasset*, 2012 WL 3930988, at *7-10.

⁵⁵ *Id.* at *10.

⁵⁶ *Id.* at *9.

⁵⁷ *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 492-96 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012).

⁵⁸ *Id.* at 490.

the jury found that Tenenbaum's infringement was willful.⁵⁹ After being instructed on the applicable statutory range of \$750 to \$150,000 per infringed work for willful conduct⁶⁰ and a nonexhaustive list of factors it could consider in choosing an amount,⁶¹ the jury awarded statutory damages of \$22,500 for each infringed recording.⁶² The total statutory damages award was \$675,000.⁶³

Judge Gertner found that the jury's statutory damages award against Tenenbaum violated due process; she did not consider whether the amount was excessive under nonconstitutional review standards.⁶⁴ Unlike the district judge and the Eighth Circuit in *Thomas-Rasset*, Judge Gertner assumed that *Gore/Campbell* applied in evaluating whether the jury's award of statutory damages was unconstitutionally excessive.⁶⁵ Her *Gore/Campbell* analysis relied heavily on the assertion that Congress likely did not contemplate the possibility of such large awards against individual, not-for-profit infringers like Tenenbaum; she thus gave little deference to the range authorized by Congress in her due process inquiry.⁶⁶ Sidestepping *Williams*, she asserted that the differences between the approaches of *Gore/Campbell* and *Williams* "are, in practice, minimal,"⁶⁷ an assertion that this Article will counter.⁶⁸ Judge Gertner also suggested that the aggregation of multiple awards of statutory damages could present constitutional issues not posed by a single award of statutory damages.⁶⁹

⁵⁹ *Id.*

⁶⁰ *Id.* at 489 (citing 17 U.S.C. § 504(c) (2006)).

⁶¹ *Id.* at 503–04 (noting that district court had instructed the jury as to a set of nonexhaustive factors that the jury could consider, including "the nature of the infringement; the defendant's purpose and intent, the profit that the defendant reaped, if any, and/or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant's continuation of infringement after notice or knowledge of copyright claims; and the need to deter this defendant and other potential infringers").

⁶² *Id.* at 490.

⁶³ *Tenenbaum*, 660 F.3d at 490.

⁶⁴ *Tenenbaum I*, 721 F. Supp. 2d 85, 89 (D. Mass. 2010). Judge Gertner explained that although avoiding the constitutional issue would always be "the better choice," *id.* at 88, the plaintiffs had stated that they likely would not accept a remitted award "under the common law doctrine of remittitur," *id.* at 88, 91, and thus at retrial on damages, she "would again be presented with the very constitutional issues that the remittitur procedure was designed to avoid" *id.* at 88.

⁶⁵ *Id.* at 95–116.

⁶⁶ *Id.* at 104 ("Just because the jury's award fell within the broad range of damages that Congress set for *all* copyright cases does not mean that the members of Congress who approved the language of section 504(c) intended to sanction the eye-popping award *in this case*.").

⁶⁷ *Id.* at 101.

⁶⁸ See *infra* notes 292–99 and accompanying text.

⁶⁹ *Tenenbaum I*, 721 F. Supp. 2d at 115 (stating that "the reprehensibility of a file sharer's conduct does not increase linearly with the number of songs he downloads and

In determining the maximum amount of statutory damages permissible against the defendant under due process, Judge Gertner in *Tenenbaum* cited the *Thomas-Rasset* opinion in which the district judge found that three times the statutory minimum of \$750 was the maximum amount permissible under nonconstitutional review.⁷⁰ Judge Gertner adopted that amount as the maximum permissible against the defendant under due process, and she accordingly reduced the award to \$2,250 per infringement, for a total award of \$67,500—one-tenth of the jury’s award.⁷¹ She reduced the statutory damages award outright by amending the judgment; she did not give the recording companies the option of a new trial.⁷²

The United States Court of Appeals for the First Circuit vacated Judge Gertner’s due process ruling, reinstated the jury’s award, and remanded to the district court for consideration of “common law remittitur.”⁷³ The appellate court stated that, under the principle of constitutional avoidance, Judge Gertner had erred in not considering whether the award was excessive on nonconstitutional grounds before considering whether the award violated due process.⁷⁴ In using the phrase “common law remittitur,” the appellate court in *Tenenbaum*, like the district court in *Thomas-Rasset*, obscured an important distinction between reviewing remedies created by courts via the common law process and remedies created and bounded by Congress.⁷⁵ As I will show in

shares” and that “the aggregation of statutory damages awarded under section 504(c) may result in unconscionably large awards”).

⁷⁰ *Id.* at 117.

⁷¹ *Id.* at 117–18.

⁷² *Id.* at 88. On appeal, the U.S. Court of Appeals for the First Circuit expressed skepticism as to whether the district court had the power to reduce outright the jury’s statutory damages award without giving the plaintiff the option of a new trial. *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 513–15 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012). The court cited conflicting cases on the power of courts to reduce punitive damages awards outright. *Id.* I have previously argued that even when a jury’s punitive damages award is deemed to be so grossly excessive as to violate due process, the Seventh Amendment prohibits a court from reducing the amount without giving the plaintiff the option of a new trial. Colleen P. Murphy, *Judgment as a Matter of Law on Punitive Damages*, 75 TUL. L. REV. 459, 467–68 (2000); *cf.* *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (holding that appellate courts should apply *de novo* standard when reviewing district court’s determination of constitutionality of punitive damages award and stating that “[b]ecause the jury’s award of punitive damages does not constitute a finding of ‘fact,’” *de novo* appellate review of the district court’s determination does not violate the Seventh Amendment).

⁷³ *Tenenbaum*, 660 F.3d at 490; *see also id.* at 515 n.27 (“We do not take as given the questionable proposition that in enacting the Copyright Act, Congress intended to eliminate the common law power of the courts to consider remittitur.”).

⁷⁴ *Id.* at 489–90, 510–11.

⁷⁵ The Supreme Court has disaggregated the procedural device of remittitur from common law standards of review for excessiveness. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 423 (1996) (mentioning availability of remittitur in a context in which the standard of review was dictated by state law—“deviates materially from what would be

Part III, standards of nonconstitutional review, and the manner in which courts have applied those standards, are different for remedies created by the common law than for remedies created by Congress.

In terms of due process review, the First Circuit questioned, without deciding, whether *Williams* or *Gore/Campbell* applies to awards of copyright statutory damages.⁷⁶ Moreover, the First Circuit noted that *Williams* and *Gore* concerned state-authorized awards of damages, while *Tenenbaum* concerned “[c]ongressionally set awards of damages.”⁷⁷ The court continued that “[t]his fact . . . raises concerns about intrusion into Congress’s power under Article I, Section 8 of the Constitution.”⁷⁸ The appellate court instructed that if the district court on remand determined that the jury’s award did “not merit common law remittitur,” the district court and parties would need to address “the relationship between the remittitur standard and the due process standard for statutory damage awards.”⁷⁹

On remand to the district court, the case was reassigned to Judge Rya Zobel because Judge Gertner had retired from the federal bench.⁸⁰ Judge Zobel held that the jury’s total statutory damages award of \$675,000 was not excessive on either nonconstitutional or constitutional grounds.⁸¹ As directed by the First Circuit, Judge Zobel evaluated whether “common law remittitur” was appropriate, and she invoked the common law standard that a jury’s award may be set aside only if it is grossly excessive or shocks the conscience of the court.⁸² For this standard, Judge Zobel cited cases that involved compensatory damages; none involved congressionally created monetary remedies.⁸³ She determined that *Tenenbaum*’s conduct, in light of the factors on which the jury was instructed, supported the jury’s award.⁸⁴ In concluding that the jury’s award

reasonable compensation”—rather than the common law standard of “shock the conscience”).

⁷⁶ *Tenenbaum*, 660 F.3d at 512–13.

⁷⁷ *Id.* at 513.

⁷⁸ *Id.*

⁷⁹ *Id.* at 515 n.28.

⁸⁰ Docket Entry, *Tenenbaum II*, No. 07-11446-RWZ (D. Mass. Nov. 30, 2011). Upon retirement from the bench, Judge Gertner accepted a position as Professor of Practice at Harvard Law School. See *Recent News and Spotlights*, HARVARD LAW SCHOOL, http://www.law.harvard.edu/news/2011/02/4_practice.html (last visited Aug. 29, 2012).

⁸¹ *Tenenbaum II*, No. 07-11446-RWZ, 2012 WL 3639053, slip op. at *3, *6 (D. Mass. Aug. 23, 2012).

⁸² *Id.* at *2.

⁸³ *Id.* The cases Judge Zobel quoted were *Smith v. Kmart Corp.*, 177 F.3d 19, 30 (1st Cir. 1999) (involving compensatory damages for pain and suffering); *Correa v. Hosp. S.F.*, 69 F.3d 1184, 1197 (1st Cir. 1995) (involving compensatory damages for wrongful death and pain and suffering); *E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40 F.3d 492, 502 (1st Cir. 1994) (involving compensatory damages for repair costs and lost profits); *Wagenmann v. Adams*, 829 F.2d 196, 215 (1st Cir. 1987) (involving compensatory damages for civil rights, tort, and legal malpractice claims); *Segal v. Gilbert Color Sys., Inc.*, 746 F.2d 78, 81 (1st Cir. 1984) (involving compensatory damages in employment case).

⁸⁴ *Tenenbaum II*, 2012 WL 3639053, at *2.

“was not so excessive as to merit remittitur,” Judge Zobel noted that the award per infringement was only fifteen percent of the applicable statutory maximum for willful infringement.⁸⁵ She observed also that the award was below the statutory maximum for non-willful infringement.⁸⁶

Judge Zobel then turned to whether the amount of the jury’s award violated due process. She ruled that *Williams*, not *Gore*, governs whether an award of statutory damages violates due process.⁸⁷ Judge Zobel additionally remarked that “[t]he court is also sensitive to the separation of powers issues raised by a challenge to a statutory damages range determined by Congress.”⁸⁸ Judge Zobel determined that the award did not violate due process because of the “deference afforded Congress’ statutory award determination and the public harms it was designed to address,” the conduct of the defendant, and the fact that the award was below the statutory maximums for willful and non-willful infringement.⁸⁹ Tenenbaum has filed a notice of appeal from Judge Zobel’s order.⁹⁰

Thomas-Rasset and *Tenenbaum* illustrate that with respect to congressionally created remedies within monetary boundaries, several issues of nonconstitutional and constitutional review must be addressed. Most fundamentally, there are questions concerning the proper standards of review and how courts have applied various review standards. Within constitutional review, there is the additional question whether an aggregated award for multiple statutory violations may be excessive under due process when the award for a single violation is not. I will explore these questions in detail in Parts III and IV, but first, it is necessary to sketch the varieties of legislative monetary remedies and how they differ from judicially created remedies.

B. The Unique Character and Purposes of Legislatively Created Monetary Remedies

When Congress authorizes monetary remedies for causes of action that it has created, it may authorize one or more judicially created remedies—remedies that historically were created by courts via the common law process. The principal judicially created monetary remedies are compensatory damages for plaintiff’s loss, restitution of defendant’s gain, and punitive damages.⁹¹

⁸⁵ *Id.* at *3.

⁸⁶ *Id.*

⁸⁷ *Id.* at *5–6.

⁸⁸ *Id.* at *5.

⁸⁹ *Id.* at *6.

⁹⁰ Defendant’s Notice of Appeal, *Tenenbaum II*, No. 1:07-cv-11446-RWZ, 2012 WL 3639053 (D. Mass. Sept. 17, 2012).

⁹¹ Some restitutionary monetary remedies are technically “equitable” as opposed to “legal.” See Colleen P. Murphy, *Misclassifying Monetary Restitution*, 55 SMU L. REV. 1577, 1598–1607 (2002). Beyond the principal monetary remedies of compensatory damages, punitive damages, and restitution, Congress may also provide for ancillary monetary remedies, such as attorney fees.

Alternatively, Congress may fashion new types of monetary remedies, which I call legislatively or congressionally created remedies. Such remedies include “damages” (used in the loose sense of a monetary remedy that is not measured by the plaintiff’s actual monetary losses);⁹² “liquidated damages”;⁹³ “statutory damages”;⁹⁴ remedies, such as “treble damages,” that are multipliers of judicially created remedies;⁹⁵ and remedies that are not designated by any term.⁹⁶ Complicating matters, the term used for a congressionally created remedy may have different meanings depending on the statute.⁹⁷

Sometimes, Congress will use the terms “penalties”⁹⁸ or “fines”⁹⁹ to describe legislatively created monetary remedies available to private claimants. More typically, however, Congress uses these terms to apply to civil or criminal monetary awards that the federal government may obtain. For analytic clarity, I use the terms “penalties” or “fines” to refer to awards payable to the

⁹² See, e.g., Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3)(B) (2006) (authorizing “an action to recover for actual monetary loss . . . or to receive \$500 in damages for each such violation, whichever is greater”).

⁹³ See, e.g., Cable Communication Policy Act of 1984, 47 U.S.C. § 551(f)(2)(A) (2006) (authorizing “actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher”).

⁹⁴ See, e.g., Satellite Home Viewer Act, 17 U.S.C. §§ 119(a)(6)(A)–(B) (Supp. IV 2011) (authorizing, in addition to other monetary remedies under sections 502 through 506 of the Copyright Act, statutory damages not to exceed \$2,500,000 for each three-month period during which a pattern or practice of violation was carried out); 47 U.S.C. § 605(e) (2006) (providing for “statutory” damages in lieu of actual damages and profits); 47 U.S.C. § 553(c)(3)(A) (same).

⁹⁵ See, e.g., Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e(b)(2)(A) (Supp. IV 2011).

⁹⁶ See, e.g., 25 U.S.C. § 305e(b)(2) (authorizing, as an alternative to trebling the plaintiff’s losses and defendant’s gross profits, an award of “not less than \$1,000 for each day”).

⁹⁷ For example, the term “statutory damages” in one statute may be a mutually exclusive alternative to judicially created remedies, while in another statute, “statutory damages” may be authorized in addition to judicially created monetary remedies. Compare Satellite Home Viewer Act, 17 U.S.C. §§ 119(a)(6)(A)–(B) (authorizing, in addition to other monetary remedies under sections 502 through 506 of the Copyright Act, statutory damages not to exceed \$2,500,000 for each three-month period during which a pattern or practice of violation was carried out), with 47 U.S.C. § 553(c)(3)(A)(ii) (2006) (providing for “statutory damages” in lieu of actual damages and profits for unauthorized reception of cable service), and 47 U.S.C. § 605(e)(3)(C)(i)(II) (2006) (providing for “statutory damages” in lieu of actual damages and profits for unauthorized publication or use of communications by wire or radio).

⁹⁸ See, e.g., Clean Water Act, 33 U.S.C. § 1319(d) (2006) (authorizing government to obtain civil “penalties” of up to \$25,000 per day per violation); 47 U.S.C. § 338(i)(7)(A)–(C) (2006) (labeling as “penalties” a section that allows an aggrieved person to recover actual damages or, alternatively, liquidated damages, plus punitive damages, attorneys’ fees, and litigation costs).

⁹⁹ See, e.g., 46 U.S.C. § 30707(c) (2006) (authorizing a “fine” to be shared equally between the person injured and the federal government).

government that are at least partially punitive and thus subject to the Excessive Fines Clause.¹⁰⁰ I use the term “remedies” to refer to awards payable to private claimants (awards that may or may not have punitive purposes) or awards payable to the government that lack any punitive purpose.

Regardless of the label, congressionally created monetary remedies typically differ from judicially created remedies in their purposes, and the purposes of a particular congressionally created remedy may vary with the relevant legislative scheme. Also, congressionally created monetary remedies usually have statutory boundaries for the amount that can be awarded, unlike judicially created remedies that ordinarily have no statutory limits, even when the underlying cause of action was created by Congress.¹⁰¹

1. *Legislatively Created Remedies Contrasted to Judicially Created Remedies*

Congress often authorizes a legislatively created remedy that is alternative or additional to a judicially created remedy.¹⁰² Among the statutes authorizing such legislatively created remedies are those involving consumer protection, intellectual property, privacy, and communications.¹⁰³ When Congress authorizes a legislatively created remedy that is alternative to a judicially created remedy, it typically either specifies that the plaintiff is entitled to the greater of the two remedies or it forces the plaintiff to choose between receiving either the judicially created remedy or the legislatively created remedy. An example of a “greater of the remedies” provision is language that authorizes the plaintiff “to recover for actual monetary loss . . . or to receive \$500 in damages for each . . . violation, whichever is greater.”¹⁰⁴ An example of a provision

¹⁰⁰ See *infra* note 231 and accompanying text.

¹⁰¹ Congress rarely has capped common law remedies. See *infra* note 312 and accompanying text.

¹⁰² Congress sometimes uses terms such as “actual damages” or “economic loss,” which are subsets of the judicially created remedy of compensatory damages. “Actual profits” is a subset of restitution—a body of remedial law created historically by courts.

¹⁰³ See *infra* note 104.

¹⁰⁴ Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(3)(B) (2006). Other examples of statutes authorizing the plaintiff to recover the greater of the legislatively created remedy versus the judicial remedies include: 18 U.S.C. § 2520(c)(1)(A) (2006) (providing that “the court shall assess the greater of the sum of actual damages suffered by the plaintiff, or statutory damages of not less than \$50 and not more than \$500”); Stored Communications Act, 18 U.S.C. § 2707(c) (2006) (stating that a plaintiff is entitled to “the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000”); 18 U.S.C. § 2710(c)(2)(A) (2006) (providing that for wrongful disclosure of videotape rental or sale records, court may award, in part, “actual damages but not less than liquidated damages in an amount of \$2,500”); 42 U.S.C. § 2000aa-6(f) (2006) (in action against governmental unit for search or seizure unlawful under the statute, plaintiff “shall be entitled to recover actual damages but not less than liquidated damages of \$1,000”); Cable

requiring the plaintiff to choose between the legislatively created remedy and the judicially created remedy is the Copyright Act language that “the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages.”¹⁰⁵ When Congress authorizes legislatively created remedies that are additional to judicially created remedies, it often chooses to allow up to double or treble the amount of compensatory damages or defendant’s profits¹⁰⁶ or to authorize an award within a specified monetary range to supplement those damages or profits.¹⁰⁷

When Congress authorizes a legislatively created remedy as alternative or additional to judicially created remedies, the legislatively created remedy can cure possible inadequacies of judicially created remedies. For example, the loss to a person whose statutory rights have been violated or the gain to the violator may be very small or hard to prove. Persons whose statutory rights have been violated therefore may not have economic incentive via compensation or restitution to enforce their rights. The legislatively created remedy guarantees at least a minimal level of recovery for the right holder, thus encouraging enforcement of the statute. Another common purpose of a legislative monetary remedy is to deter statutory violations; judicially created remedies may be too hard to prove or too insignificant to deter a particular person from violating the

Communications Policy Act of 1984, 47 U.S.C. § 551(f)(2)(A) (2006) (authorizing “actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher”); and 50 U.S.C. § 1810(a) (2006) (authorizing “actual damages, but not less than liquidated damages of \$1,000 or \$100 per day for each day of violation, whichever is greater” for violations of intelligence surveillance rights).

¹⁰⁵ 17 U.S.C. § 504(c)(1) (2006). Other statutes that require the plaintiff to choose between the legislatively created remedy and the judicial remedy include: 47 U.S.C. § 553(c)(3)(A) (2006) (providing that, for unauthorized reception of cable services, the aggrieved party may recover actual damages and the violator’s profits or “statutory damages . . . in a sum of not less than \$250 or more than \$10,000 as the court considers just”); 47 U.S.C. § 605(e)(3)(C)(i) (2006) (providing, for unauthorized publication or use of communications by wire or radio, that “at the election of the aggrieved party,” the party may recover actual damages and the violator’s profits or “statutory damages . . . not less than \$1,000 or more than \$10,000, as the court considers just”).

¹⁰⁶ See, e.g., Indian Arts and Crafts Act of 1990, 25 U.S.C. § 305e(a)(2) (2006) (authorizing treble damages, with “damages” defined to include defendant’s gross profits); Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b) (2006) (specifying that an employer shall be liable to the “employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages”); *id.* § 260 (specifying that, if an employer acted in good faith, the “court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title”).

¹⁰⁷ See, e.g., Satellite Home Viewer Act, 17 U.S.C. §§ 119(a)(6)(A)–(B) (Supp. IV 2011) (authorizing, in addition to other monetary remedies under sections 502 through 506 and 509 of the Copyright Act, statutory damages not to exceed \$2,500,000 for each three-month period during which a pattern or practice of violation was carried out).

statute. Punishment may be another aim of a legislatively created remedy. Because the availability of the judicially created remedy of punitive damages usually depends on meeting a very high substantive law threshold, such as conduct that is malicious or intentional,¹⁰⁸ Congress may wish punishment to be available at a lower threshold.

Beyond the possibility of a legislatively created remedy curing inadequacies of judicially created remedies, the legislatively created remedy may serve a different purpose altogether—to allow a remedy for violation of the right itself, apart from compensatory, restitutionary, deterrent, or punitive purposes. The plaintiff obtains at least a minimal level of recovery because of the intrinsic value of the right itself. To illustrate, consider the hypothetical context of an author of a highly acclaimed novel who repeatedly stated that she will never create a work that is related to the novel and that she will seek to prevent anyone else from publishing a related work.¹⁰⁹ A high school theater group later writes and stages a play based on the novel without the prior knowledge of the author or her publisher. The group did not charge admission to the play and thus gained no profits. The author likely did not suffer “actual damages” under the Copyright Act because she disclaimed using the novel for financial gain beyond publication of the book itself.¹¹⁰ Any statutory damages award under the Copyright Act in this hypothetical context might further deterrent and punitive purposes, but more directly, the legislatively created remedy seems to protect the intrinsic value of the statutory right itself.¹¹¹

This notion of a remedy protecting the inherent value of the right itself exists also in the common law. One example is protecting exclusive use to property with a monetary award, even though the plaintiff had no intention of using the property and no harm was done to the property.¹¹² Another example is

¹⁰⁸ See generally JAMES M. FISCHER, UNDERSTANDING REMEDIES § 202, at 923–26 (2d ed. 2006) (discussing various threshold requirements that jurisdictions may employ with respect to punitive damages).

¹⁰⁹ This example is similar to J.D. Salinger’s expressed intention not to create a work related to his classic novel, *The Catcher in the Rye*, and his refusal to allow anyone else to produce a work related to the novel. J.D. SALINGER, *THE CATCHER IN THE RYE* (1951). See *Salinger v. Colting*, 641 F. Supp. 2d 250, 268 (S.D.N.Y. 2009) (granting preliminary injunction in favor of Salinger against publication of defendant’s novel and citing Plaintiff’s Memorandum of Law for court’s assertion that “Salinger has not demonstrated any interest in publishing a sequel or other derivative work” of *The Catcher in the Rye*), *vacated*, 607 F.3d 68 (2d Cir. 2010).

¹¹⁰ See 17 U.S.C. §§ 504(a)–(b) (2006).

¹¹¹ See 17 U.S.C. § 504(c) (2006).

¹¹² See DAN B. DOBBS, LAW OF REMEDIES 308 (2d ed. 1993) (stating the notion that “certain deprivations in themselves really are ‘damage’ or harm . . . recognized in property torts when defendants are held liable for use of the plaintiff’s money or property even though no harm was done and even though the plaintiff himself would not have used the property”); *id.* at 262 (discussing “[d]amages to [r]eflect [i]nherent [v]alue of [r]ights”).

that of presumed damages.¹¹³ In suits involving invasions to dignitary interests (such as reputation and privacy), or to civil rights (such as voting rights), courts have allowed damages that redress loss of the right itself, even in the absence of harm to the plaintiff or gain to the defendant resulting from the legal violation.¹¹⁴ These kinds of awards vindicate noneconomic, rather than economic, rights.¹¹⁵

2. *Monetary Boundaries for Legislatively Created Remedies*

When Congress creates a legislative monetary remedy, whether it is the sole remedy for a cause of action, a remedy alternative to judicially created remedies, or a remedy additional to judicially created remedies, the legislatively created remedy almost always has monetary boundaries.¹¹⁶ The creation of boundaries for legislatively created remedies is justifiable because these remedies are not limited to compensation or restitution. An award of compensation or restitution intrinsically is bounded by how much the plaintiff lost or the defendant gained, respectively. By contrast, with so many different possible purposes, legislatively created remedies necessitate extrinsic monetary boundaries.

Congress creates boundaries for legislative monetary remedies in one of two ways—it either makes the remedy mathematically certain or it creates a monetary range for the remedy. Mathematically certain remedies created by

¹¹³ Professor Dobbs has equated certain federal statutory damages awards to presumed damages. *Id.* at 317 (citing statutory damages provisions under federal illegal wiretapping and improper debt collection laws).

¹¹⁴ *See generally id.* at 248–355 (discussing presumed damages for invasion of civil rights and dignitary interests); *id.* at 261 (stating that a purpose of presumed damages is “to ascribe a value to the right in question irrespective of the plaintiff’s actual harm beyond loss of the right itself”).

¹¹⁵ *Id.* at 272.

¹¹⁶ A rare exception occurs in the Lanham Act, which allows a plaintiff asserting trademark infringement, under certain circumstances, to recover defendant’s profits, any damages sustained by the plaintiff, and the costs of the action. Lanham Act, 15 U.S.C. § 1117(a) (2006). With respect to recovery of defendant’s profits, the Act has an unusual provision granting the court very expansive power without an upper monetary limit: “If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case.” *Id.* The Act further specifies that such a sum “shall constitute compensation and not a penalty.” *Id.* Another example of a statute without an upper limit on a congressionally created monetary remedy is the Indian Arts and Crafts Act, which authorizes, as an alternative to trebling the plaintiff’s losses and defendant’s gross profits, an award of “not less than \$1,000 for each day.” 25 U.S.C. § 305e(a)(2)(B) (2006). Moreover, in the criminal context, the treason statute has no cap on the amount of the fine that can be imposed. 18 U.S.C. § 2381 (2006) (providing that individuals who are convicted of treason against the United States “shall suffer death, or shall be imprisoned not less than five years and fined . . . not less \$10,000”).

Congress are of two main types: remedies that are set at a sum certain¹¹⁷ or remedies that are a precise multiplier of other remedies.¹¹⁸ With mathematically certain legislatively created remedies, no discretion as to the amount of an individual award exists. Once the court finds the defendant to have engaged in the conduct prohibited by the statute, the amount of the award is determined as a matter of law. Thus, review for excessiveness is not available unless the statutory provision itself is attacked as unconstitutionally excessive.

With a monetary range for a legislatively created remedy, Congress vests discretion in the trial decisionmaker (be it judge or jury) to determine the appropriate amount on the facts of the case; questions of both nonconstitutional and constitutional review thus may arise. The most obvious type of range for a legislative monetary remedy is a combined floor (which can be zero or greater) and cap for the remedy, such as in the Copyright Act.¹¹⁹ Another type of range is a flexible multiplier, allowing a court to increase an underlying award “up to” or “not more than” the multiplied amount.¹²⁰

¹¹⁷ For an example of sum certain legislative remedies, see 18 U.S.C. § 2520(c)(2)(A) (2006) (For illegal interception of wire or electronic communications, the plaintiff may recover the greater of the sum of actual damages suffered by the plaintiff and any profits made by the violator or “statutory damages of whichever is *the greater of \$100 a day for each day of violation or \$10,000.*” (emphasis added)).

¹¹⁸ An example of the multiplier remedy is double or treble “damages.” See, e.g., Fair Labor Standards Act, 29 U.S.C. § 216(b) (2006) (entitling employee to unpaid minimum wages or unpaid overtime compensation and “an additional equal amount as liquidated damages”). Congress has enacted statutes that have automatic treble damages provisions. See, e.g., 15 U.S.C. § 15 (Supp. IV 2011) (antitrust); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964 (2006). In these multiplier statutes, “damages” modified by “double” or “treble” typically means either compensation for plaintiff’s losses or some statutorily defined alternative such as the combination of plaintiff’s damages and defendant’s profits. For example, the Indian Arts and Crafts Act authorizes “treble damages” but expands “damages” beyond compensation for plaintiff losses to include defendants’ profits. 25 U.S.C. § 305e(b)(2) (defining “damages” for purpose of trebling as “includ[ing] any and all gross profits accrued by the defendant” in violating the statute).

¹¹⁹ The floor can be zero, see, e.g., Satellite Home Viewer Act, 17 U.S.C. §§ 119(a)(6)(A)–(B) (Supp. IV 2011) (authorizing, in addition to other monetary remedies under sections 502 through 506 of the Copyright Act, statutory damages *not to exceed \$2,500,000* for each three-month period during which a pattern or practice of violation was carried out (emphasis added)); 47 U.S.C. § 553(c)(3)(B) (2006) (“In any case in which the court finds that the violation was committed willfully and for purposes of commercial advantage or private financial gain, the court in its discretion *may increase the award of damages*, whether actual or statutory . . . *by an amount of not more than \$50,000.*” (emphasis added)), or the floor can be a non-zero sum, such as with the Copyright Act, see *supra* notes 22–23 and accompanying text.

¹²⁰ See, e.g., Lanham Act, 15 U.S.C. § 1117(a) (2006) (providing that “the court may enter judgment . . . for any sum above the amount found as actual damages, not exceeding three times such amount”; the Lanham Act further specifies that “[s]uch sum . . . shall constitute compensation and not a penalty”); Fair Labor Standards Act, 29 U.S.C. § 260 (2006) (stating that if employer acted in good faith, “court may, in its sound discretion, award no liquidated damages or *award any amount thereof not to exceed* the amount

A legislatively created remedy to be imposed within a statutory range serves some purposes different from a mathematically certain remedy. An award within a statutory range can be more sensitive to the circumstances of a particular case than a mathematically certain remedy. Moreover, a degree of uncertainty as to the amount of a remedy that will be imposed in a particular case may serve useful deterrent purposes—it is more difficult for a potential violator to calculate what the “price” will be to violate the statute.

In choosing a minimum and maximum amount of a legislatively created remedy, Congress intrinsically makes a valuation of the statutory cause of action. A non-zero minimum for a range means that the legislatively created remedy is addressing something other than a right holder’s losses or a right violator’s gains, because those losses or gains could be zero. Furthermore, when the statutory violation is unintentional or innocent, a non-zero minimum may have the purpose of redressing the value of the right itself because punishment or deterrence is less relevant.

The minimum non-zero boundary that Congress creates for legislatively created remedies can be quite small, such as the \$100 minimum in statutory damages under the Fair and Accurate Credit Transactions Act,¹²¹ and the maximum boundary can be quite large, such as the \$2.5 million in statutory damages that can be added to other remedies under the Satellite Home Viewer Act.¹²² Even when the minimum statutory amount is low, high aggregate awards are possible when the defendant has committed multiple violations of the statute. The courts in *Thomas-Rasset* and *Tenenbaum* noted this possibility under the Copyright Act, but other statutes admit this possibility as well, such as when a defendant has sent hundreds of unsolicited faxes to a person in violation of federal law¹²³ or when the defendant has affected an entire class in illegally printing full credit card numbers on receipts.¹²⁴

Sometimes, Congress specifies meaningful factors in the statute to inform the decisionmaker’s selection of an award within the statutory boundaries.¹²⁵

specified in section 216 of this title”; section 216 provides for employee recovery of unpaid minimum wages or unpaid overtime wages and “an additional amount as liquidated damages,” *id.* § 216 (emphasis added)); Patent Act, 35 U.S.C. § 284 (2006) (providing that “the court *may increase the damages up to three times* the amount found or assessed” (emphasis added)).

¹²¹ 15 U.S.C. § 1681n(a)(1)(A) (2006).

¹²² 17 U.S.C. §§ 119(a)(6)(A)–(B) (authorizing, in addition to other monetary remedies under sections 502 through 506 of the Copyright Act, statutory damages not to exceed \$2,500,000 for each three-month period during which a pattern or practice of violation was carried out).

¹²³ Telephone Consumer Protection Act, 47 U.S.C. § 227 (2006).

¹²⁴ 15 U.S.C. § 1681c(g) (2006).

¹²⁵ *See, e.g.,* Truth in Lending Act, 15 U.S.C. § 1640(a) (2006) (requiring that a district court, in setting class action awards of statutory damages, must consider, among other relevant factors, “the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons

Commonly, however, the statute does not provide any factors,¹²⁶ or, like the Copyright Act, simply requires the court to award a “just” amount, a standard that presumably is implicit in any statutory provision for a legislatively created remedy.

Thus far, I have outlined questions pertaining to nonconstitutional and constitutional review of the amount of congressionally created remedies, and I have sketched the varieties of such remedies. Within the large category of congressionally created monetary remedies, the focus for the remainder of the article is on those remedies that are bounded by a range set by Congress.

III. NONCONSTITUTIONAL REVIEW OF LEGISLATIVELY CREATED REMEDIES

Whether a reviewing court may review an award of a legislatively created remedy for excessiveness on nonconstitutional grounds should depend on whether Congress has specified factors to guide the trial decisionmaker’s choice of amount within the statutory range. Courts may review if an award is reasonable in light of any statutory factors Congress has enacted, but courts otherwise should not have the authority to review a trial decisionmaker’s decision as to amount. In developing this proposal, I will contrast the review of legislatively created remedies to the review of judicially created remedies. This proposal parallels nonconstitutional review that has been available in federal sentencing, both in the past, when the selection of individual sentences within statutory ranges was highly discretionary, and now, when the selection of individual sentences is guided by statutory factors.

A. *Whether Judicial Review of Amount Is Permissible*

To the extent that Congress has not specified in the statute any factors that should guide the amount of an award within the statutory range, courts should not have the power to review for excessiveness because Congress has vested complete discretion in the trial decisionmaker to choose an amount within the statutory range. To the extent that Congress has specified statutory factors to guide the choice of amount, excessiveness review should consider whether the award is unreasonable in light of the statutory factors.

adversely affected, and the extent to which the creditor’s failure of compliance was intentional”).

¹²⁶ See, e.g., Patent Act, 35 U.S.C. § 284 (2006) (providing that “the court may increase the damages up to three times the amount found or assessed”).

1. *No Statutory Factors to Inform Choice within Range*

If a statute does not contain any factors to guide the trial decisionmaker's choice of an award within the statutory range, the question becomes whether any nonconstitutional limits on the decisionmaker's discretion exist. Put another way, may a trial judge's or jury's choice of an amount within the statutory range be set aside as excessive on nonconstitutional grounds? I will analyze this question from three perspectives—congressional intent, the requirements of procedural due process, and inherent judicial authority. My conclusion is that reviewing courts do not have the power to deem an award within a statutory range excessive on nonconstitutional grounds if Congress did not specify factors to guide the initial choice of amount.

With respect to congressional intent, a strict textual argument could be that a statute that lacks any criteria for choosing an amount within the applicable range gives complete discretion to the decisionmaker within the range. Under this statutory interpretation, a decisionmaker's choice of amount in an individual case would not be subject to judicial review. Alternatively, rather than vesting complete discretion in the decisionmaker, the statute could be interpreted as merely silent on how to choose an amount. From this silence, one might discern congressional intent in various ways.

One possible inference from silence is that Congress implicitly intended that courts in individual cases would implement the underlying purposes of the statute.¹²⁷ This inference would allow courts to create factors to constrain the initial choice of amount and to review that choice. A rebuttal to such an inference is that Congress already rendered a judgment on amounts that fulfill statutory purposes when it created the minimum and maximum of the range. Thus, any amount within the range arguably fulfills the statutory purposes.

Another possible inference from silence on how to choose an amount within the range is that the statute should be interpreted in light of background legal principles.¹²⁸ One could argue that Congress legislated against a background legal principle that monetary remedies awarded in particular cases should not be excessive and that courts accordingly have the power to review for excessiveness, even when the amount is within the range prescribed by Congress. The problem with such an argument is that the Supreme Court in 1935 announced that congressional silence should not be read that way; rather,

¹²⁷ Cf. *United States v. Booker*, 543 U.S. 220, 260–61 (2005) (stating that “a statute that does not *explicitly* set forth a standard of review may nonetheless do so *implicitly*” and that “[w]e infer appropriate review standards from related statutory language, the structure of the statute, and the ‘sound administration of justice’”).

¹²⁸ See generally WILLIAM N. ESKRIDGE ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 298–303 (2d ed. 2006) (discussing role of common law in interpreting statutory language); Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 537 (2010) (noting “principle that statutes ordinarily should be read to incorporate background legal principles”).

the Court said that no review for excessiveness is permissible if the amount chosen was within a statutory range.¹²⁹

In the only Supreme Court decision to have opined on nonconstitutional excessiveness review of legislatively created remedies, *Douglas v. Cunningham*,¹³⁰ the Court discussed an earlier version of the Copyright Act. At the time, the Act allowed statutory damages between \$250 and \$5,000; then, as now, the Act did not specify any factors to inform the decisionmaker's choice of an amount within the applicable range.¹³¹ The trial court had awarded the statutory maximum of \$5,000, but the appellate court, concluding that the trial court had abused its discretion, reduced the damages to \$250.

The Supreme Court reversed the appellate court, stating:

[T]he employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion. This construction is required by the language and the purpose of the statute.¹³²

Thus, the Court held that abuse of discretion review was improper when the trial judge had, as directed by the statute, chosen an amount within the statutory range. Instead, the Court held that no review was permissible of the trial decisionmaker's choice of amount.¹³³

Although the *Douglas* Court indicated that its no-review stance was compelled by the language and the purpose of the Copyright Act, its reasoning seemingly applies whenever the trial decisionmaker awards a legislatively created remedy, unguided by any meaningful statutory factors, within the monetary range that Congress specified. Congressional silence as to how to choose or review the amount of a legislatively created remedy awarded within the statutory range should be read against this background principle of no review.

If *Douglas* instead is confined to its facts, one could argue that because courts long have reviewed judicially created remedies in individual cases for excessiveness, statutory silence means that Congress intended that courts should likewise perform excessiveness review of legislatively created remedies. To probe this argument, it is useful to sketch the review standards and procedures for awards of judicially created remedies.

¹²⁹ *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935).

¹³⁰ *Id.* at 207.

¹³¹ *Id.* at 210 (quoting statutory language then in effect).

¹³² *Id.*; see also *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) ("The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute.").

¹³³ See 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12.12 (1978) (citing *Douglas v. Cunningham* for the proposition that "assuming an affirmance on the issue of liability, an award of statutory damages that is within the prescribed minimum and maximum, may not be modified on appeal").

The standard of review depends on who the initial decisionmaker is. With respect to the jury as initial decisionmaker, the starting point is the Seventh Amendment, which states:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.¹³⁴

The Supreme Court has interpreted the Amendment to guarantee an entitlement to jury trial in actions brought in Article III courts seeking “legal” (as opposed to “equitable”) remedies.¹³⁵ The constitutional entitlement to jury trial thus applies not only to common law causes of action, but also to statutory causes of action for which the claimant seeks legal remedies.¹³⁶

Courts may review jury awards of judicially created remedies for whether the awards are inadequate or excessive in light of the evidence.¹³⁷ The Supreme Court has used a variety of formulations to describe the nonconstitutional excessiveness inquiry, such as whether the jury’s award is “grossly” excessive¹³⁸ or “shocks the conscience.”¹³⁹ Despite the highly deferential terms

¹³⁴ U.S. CONST. amend. VII.

¹³⁵ See, e.g., *Chauffers, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 570–74 (1990) (holding that a demand for compensatory damages representing back pay and benefits is a request for legal relief and thus confers an entitlement to jury trial under the Seventh Amendment); *Curtis v. Loether*, 415 U.S. 189, 195–96 (1974) (finding that compensatory and punitive damages are legal remedies). “Legal” remedies include not only compensatory and punitive damages, but also many forms of monetary restitution. See *Murphy*, *supra* note 91, at 1598–1607 (documenting that monetary restitution typically is a legal remedy, with important exceptions: when the money was obtained by abuse of a fiduciary or confidential relationship, when the defendant is insolvent, and when the plaintiff seeks to trace her property into another form or into the hands of a third person).

¹³⁶ See, e.g., *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347–55 (1998) (holding that “statutory damages” under the federal Copyright Act are a legal remedy and thus a Seventh Amendment right to jury trial exists); *Tull v. United States*, 481 U.S. 412, 422–25 (1987) (holding that a civil penalty under the federal Clean Water Act is a legal remedy and thus a Seventh Amendment right to jury trial exists).

¹³⁷ See generally Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 Nw. U. L. REV. 153, 188–90 (1999) (discussing historical and modern standards and techniques for reviewing compensatory and punitive damages).

¹³⁸ See, e.g., *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (stating that under the Seventh Amendment, judges may review jury awards to ensure that they are not “palpably and grossly inadequate or excessive”).

¹³⁹ See, e.g., *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 422 (1996) (noting that federal and state courts in New York previously “would not disturb an award unless the amount was so exorbitant that it ‘shocked the conscience of the court’” (quoting *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1012 (2d Cir. 1995))). If the cause of action in federal court is based on state law, a more stringent review standard supplied by the state legislature may apply. For example, a New York statute mandates judicial review for whether a jury award “deviates materially from what would be reasonable compensation.”

in these standards, modern review generally seems to have centered on whether a jury award is reasonable in light of the facts.¹⁴⁰

When a trial judge, rather than a jury, initially assesses the amount of compensatory damages or monetary restitution, the judge's finding is considered a question of fact that is reviewable for excessiveness under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52.¹⁴¹ If a trial judge initially assesses the amount of punitive damages, the appellate court's nonconstitutional excessiveness review is for abuse of discretion.¹⁴²

As with the standards of review, the procedural consequences of a finding of excessiveness depend on who the initial decisionmaker is. If a jury award is deemed excessive, the trial judge may either order a new trial or, if the plaintiff accepts a remittitur in lieu of a new trial, reduce the award to the maximum amount a reasonable jury could have found.¹⁴³ If a judge's award is deemed

N.Y. C.P.L.R. § 5501(c) (McKinney Supp. 2012). The Court in *Gasperini* held this statutory review standard applied to a diversity case in federal court and characterized the statutory standard as "tightening the range of tolerable awards" from the former "shock the conscience" standard applicable in New York. 518 U.S. at 423–25.

¹⁴⁰ See, e.g., *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 n.10 (1994) ("[T]here may not be much practical difference between review that focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence.' All of these may be rough equivalents of . . . whether 'no rational trier of fact could have' reached the same verdict." (citation omitted)); 11 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE*, § 2807, at 82–84 (2d ed. 1995) ("The power [of review] exists in the trial judge whether the verdict is unreasonably high or unreasonably low." (footnote omitted)); *id.* at 79–86.

¹⁴¹ FED. R. CIV. P. 52(a)(6) ("Findings of fact [by the trial judge] . . . must not be set aside unless clearly erroneous."); see also 1 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, *FEDERAL STANDARDS OF REVIEW* § 2.22 (4th ed. 2010) (discussing appellate review of trial judge's determination of damages).

¹⁴² See, e.g., *Schaub v. VonWald*, 638 F.3d 905, 923–24 (8th Cir. 2011) (asserting that review of trial judge's assessment of punitive damages for excessiveness is under abuse of discretion standard); *Gaffney v. Riverboat Servs. of Ind., Inc.*, 451 F.3d 424, 464 n.39 (7th Cir. 2006) (same); *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 472 (6th Cir. 2004) (same); *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir. 2002) (same).

¹⁴³ See generally 12 JAMES WM. MOORE, *MOORE'S FEDERAL PRACTICE* § 59.13[2][g][iii][A] (Daniel R. Coquillette et al. eds., 3d ed. 2012). The Supreme Court has held that under the Seventh Amendment, a federal court may not reduce outright a jury's award of compensatory damages; instead, the court must follow remittitur practice. *Hetzel v. Prince William Cnty.*, 523 U.S. 208, 211 (1998) (per curiam); *Kennon v. Gilmer*, 131 U.S. 22, 27–29 (1889). Lower federal courts are divided on whether judges may reduce jury awards of punitive damages outright. See *Murphy*, *supra* note 72, at 468 (discussing cases and arguing that the Seventh Amendment does not permit outright reduction of punitive damages). An appellate court may review under the abuse of discretion standard the trial judge's decision whether to order a new trial or remittitur. See, e.g., *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433 (2001) (stating that "[i]f no constitutional issue is raised," federal appellate review of the trial court's decision regarding a new trial or remittitur is for abuse of discretion); *Gasperini*, 518 U.S. at 438 (stating that a district court's review of a jury's determination of damages "would be subject to appellate review under the

excessive, the appellate court will either modify the award itself or remand to the district court for reconsideration.¹⁴⁴

Some courts have assumed that the standards and procedures for setting aside a jury's award of a judicially created remedy apply equally to review of a jury's award of a legislatively created remedy within a statutory range. The First Circuit in *Tenenbaum* remanded to the district court to consider whether "common law remittitur" was warranted;¹⁴⁵ the district judge in the *Thomas-Rasset* nonconstitutional review decision invoked the common law "shock the conscience" standard.¹⁴⁶ By contrast, when trial judges initially have assessed legislatively created remedies, appellate courts typically have applied more lenient review standards to those remedies than to judicially created remedies.¹⁴⁷

Legislatively created remedies are functionally distinguishable from judicially created remedies, and thus it should not be assumed that Congress intended that courts should review legislatively created remedies for excessiveness. Judicially created monetary remedies have purposes that have been defined and limited by the courts—compensatory damages for plaintiff's losses, restitution for defendant's gains, and punitive damages to punish and deter. These defined and limited purposes serve as benchmarks against which individual awards can be meaningfully reviewed. A legislatively created remedy that is statutorily guided only by minimum and maximum amounts may have a variety of different purposes. Because there is no statutory benchmark against which a particular award may be meaningfully reviewed, any finding of excessiveness baldly substitutes the reviewing court's judgment on amount for the initial decisionmaker's. Moreover, courts historically developed the review standards for judicially created remedies in the absence of legislative monetary boundaries, further undermining an argument that the background legal principle of judicial review for judicially created remedies should apply to legislatively created remedies.

I have argued that if a statute provides no guidance for how to assess the amount of a legislatively created remedy within a statutory range, then the statute should not be read to confer on courts the power to review, on nonconstitutional grounds, particular awards for excessiveness. A potential

standard the Circuits now employ when inadequacy or excessiveness is asserted on appeal: abuse of discretion").

¹⁴⁴ See CHILDRESS & DAVIS, *supra* note 141, § 2.22 at 2-146.

¹⁴⁵ Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 490 (1st Cir. 2011), *cert. denied*, 132 S. Ct. 2431 (2012).

¹⁴⁶ The court cited as authority for this conclusion an appellate decision involving the judicially created remedy of compensatory damages. *Thomas-Rasset II*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010) (citing *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003)).

¹⁴⁷ See *supra* notes 129-33, 141-42, *infra* notes 163-66 and accompanying text.

counterargument could be that procedural due process requires that awards of legislatively created remedies be subject to judicial review for excessiveness.¹⁴⁸

The strongest precedent for this procedural due process argument is *Honda Motor Co. v. Oberg*,¹⁴⁹ in which the Supreme Court struck down an Oregon constitutional provision that prohibited judicial review of the amount of punitive damages awarded by a jury.¹⁵⁰ The defendant had challenged the jury's punitive damages award of \$5 million as violating due process because the award was excessive and because Oregon courts did not have the power to correct excessive verdicts. The Supreme Court, while acknowledging that it had previously recognized that due process imposes a substantive limit on the size of punitive damages awards, limited its consideration in *Oberg* to the procedural due process question, stating: "In the case before us today we are not directly concerned with the character of the standard that will identify unconstitutionally excessive awards; rather, we are confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner."¹⁵¹ The Court asserted that judicial review of the amount of jury awards of "damages," was "a well-established common-law protection against arbitrary deprivations of property."¹⁵² The Court continued that "[p]unitive damages pose an acute danger of arbitrary deprivation of property" because jury instructions often leave the jury with wide discretion in choosing the amount and because juries may "use their verdicts to express biases against big businesses."¹⁵³ Oregon's provision violated due process because Oregon had removed the common law safeguard of judicial review against arbitrary jury awards "without providing any substitute procedure and without any indication that the danger of arbitrary awards has in any way subsided over time."¹⁵⁴

Because of the unique context of *Oberg*—a constitutional challenge to the amount of a punitive damages award—the *Oberg* ruling should not be read to apply to the very different context of a nonconstitutional challenge to the amount of a legislatively created remedy. Although the Supreme Court wrote

¹⁴⁸ In Part IV, I will discuss substantive due process requirements for reviewing whether legislatively created remedies are unconstitutionally excessive.

¹⁴⁹ 512 U.S. 415 (1994).

¹⁵⁰ *Id.* at 435.

¹⁵¹ *Id.* at 420.

¹⁵² *Id.* at 430. The Court added that in the federal courts and the courts of all the states except Oregon, "judges review the size of damages awards." *Id.* at 426.

¹⁵³ *Id.* at 432.

¹⁵⁴ *Id.* In its conclusion, the majority stated:

The common-law practice, the procedures applied by every other State, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice all support the conclusion" that a decision to punish a tortfeasor "should not be committed to the unreviewable discretion of a jury.

Id. at 435. Nowhere in the opinion did the majority cite support for its assertion of a "strong presumption favoring judicial review that we have applied in other areas of the law."

loosely of “damages” when it discussed the long tradition of judicial review of jury awards, the cases it cited all involved compensatory and punitive damages.¹⁵⁵ Thus, its ruling should not extend beyond those judicially created remedies.

Even if legislatively created remedies are considered “damages” to which common law protections presumptively apply, *Oberg* recognized that a “substitute” protection against arbitrary deprivations of property would satisfy due process.¹⁵⁶ The statutory maximum amount that Congress imposes on legislatively created remedies serves the function of protecting against arbitrary deprivations of property. *Oberg* confronted unlimited jury discretion in assessing uncapped punitive damages; these concerns are not present when Congress has created a monetary remedy that *is* capped. Congress presumably chose the maximum amount in light of legislative purposes, indicating that its choice was not arbitrary. Moreover, legislation by its nature typically covers a wide range of potential actors, obviating the *Oberg* concern of individualized bias against a disfavored defendant. Within the statutory confines, a trial decisionmaker’s choice of amount does not pose the threats of arbitrariness or unchecked bias that troubled the Court in *Oberg*.

Although I have argued that procedural due process does not require nonconstitutional review for excessiveness of a legislatively created remedy awarded within a statutory range, a separate question is whether federal courts have the inherent authority to review the trial decisionmaker’s choice of amount. A federal court’s “inherent authority” is its authority to act without any express authorization in the Constitution, a statute, or written court rule.¹⁵⁷ As the Supreme Court has explained: “Courts invested with the judicial power of the United States have certain inherent authority to protect their proceedings

¹⁵⁵ *Oberg*, 512 U.S. at 422–26. The Supreme Court similarly used the term “damages” loosely in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). It noted “overwhelming evidence that the consistent practice at common law was for juries to award damages,” by citing cases involving compensatory and punitive damages. *Id.* at 353–54. It then asserted that because juries awarded “damages” prior to the adoption of the Seventh Amendment, the Amendment guaranteed a right to have a jury assess the amount of modern copyright statutory damages. *Id.* at 348–55. I have previously criticized this reasoning and the result. See Murphy, *supra* note 137, at 164–68.

¹⁵⁶ *Oberg*, 512 U.S. at 430–31 (noting that the Court previously had held that “examination by a neutral magistrate provided criminal defendants with nearly the same protection as the abrogated common-law grand jury procedure” but that Oregon had “provided no similar substitute for the protection provided by judicial review of the amount awarded by the jury in punitive damages”).

¹⁵⁷ See generally Kendall Coffey, *Inherent Judicial Authority and the Expert Disqualification Doctrine*, 56 FLA. L. REV. 195, 197–200 (2004) (discussing Supreme Court doctrine on inherent judicial authority); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1805–06 (1995) (discussing nature of inherent judicial authority). The Supreme Court has recognized inherent judicial authority to sanction a variety of conduct, including bad faith violations of court orders, perpetration of fraud on the court, and bad-faith misconduct by a litigant. See Coffey, *supra*, at 197–200.

and judgments in the course of discharging their traditional responsibilities.”¹⁵⁸ The Court has cautioned that the extent of inherent judicial authority “must be delimited with care, for there is a danger of overreaching when one branch of the Government, without benefit of cooperation or correction from the others, undertakes to define its own authority.”¹⁵⁹

Federal courts should have the inherent authority to review an individual award of compensatory damages, punitive damages, or monetary restitution for excessiveness, because courts historically created these remedies.¹⁶⁰ Such inherent authority would explain why, when Congress creates a cause of action and authorizes one or more of these judicially created remedies, courts may review particular awards for excessiveness under judicially created standards. Even if Congress has capped the amount of compensatory and punitive damages in a particular cause of action, courts retain their authority to review awards at or below the capped amount for excessiveness.¹⁶¹

It is quite another thing, however, to ascribe to courts the inherent authority to review awards of legislatively created remedies that have been limited by Congress. If Congress created both a right and a corresponding monetary remedy, and set the remedy at a sum certain, a court would not have the inherent authority, on nonconstitutional grounds, to conclude that the amount of the remedy in an individual case was unreasonably excessive. In this circumstance, the court’s only job, upon ascertaining that the defendant violated the plaintiff’s statutory right, is to enter judgment for the amount fixed by Congress.

If it is true that courts have no inherent remedial authority when Congress has specified a legislatively created remedy at a sum certain, then it arguably follows that a court does not have the inherent authority to deem an individual award excessive if Congress instead prescribed a range for the remedy. On the other hand, one could argue that with a statutory sum certain, Congress has not given remedial decisionmaking to the courts, while with a statutory range, the courts must assess the remedy in individual cases. Perhaps inherent authority to review for excessiveness flows from the individualized remedial decision that vests in the courts. This conception of inherent judicial authority, however,

¹⁵⁸ *Degen v. United States*, 517 U.S. 820, 823 (1996).

¹⁵⁹ *Id.*

¹⁶⁰ *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008) (stating, in a context in which the Supreme Court was exercising its common law powers with respect to maritime punitive damages, “[t]raditionally, courts have accepted primary responsibility for reviewing punitive damages and thus for their evolution, and if, in the absence of legislation, judicially derived standards leave the door open to outlier punitive-damages awards, it is hard to see how the judiciary can wash its hands of a problem it created”); *id.* at 508 n.21 (“[T]he compensatory remedy sought in this case is itself entirely a judicial creation.”); *id.* (“Where there is a need for a new remedial maritime rule, past precedent argues for our setting a judicially derived standard, subject of course to congressional revision.”).

¹⁶¹ *See generally* Colleen P. Murphy, *Statutory Caps and Judicial Review of Damages*, 39 AKRON L. REV. 1001, 1002–08 (2006) (discussing judicial review of compensatory or punitive damages awards at or below the amount of statutory caps).

seems to exemplify the “overreaching” that the Supreme Court has condemned as inconsistent with inherent authority.¹⁶²

Congress has the authority to determine which kinds of remedies are necessary for the causes of action that it creates. When a reviewing court deems an award within a statutory range to be excessive, it implicitly rejects the congressional judgment that the range is not excessive. Moreover, judicial review for excessiveness can only be meaningfully accomplished if the court creates factors to guide its review—factors that Congress decided not to prescribe. Whatever the scope of inherent judicial authority over remedies in individual cases, it should not include the power to reject Congress’s judgments concerning remedies that Congress has created.

In sum, when Congress has imposed a range for a legislatively created remedy but has not specified factors to inform the choice of amount within the range, there is no compelling case that Congress intended that courts review individual awards of legislatively created remedies for excessiveness, that procedural due process requires such judicial review, or that courts have the inherent authority to engage in such review. I therefore suggest that courts should not review a legislatively created remedy awarded within a statutory range for excessiveness on nonconstitutional grounds when Congress has not specified factors to inform the choice of amount within the range. *Douglas* was rightly decided and should be followed by the lower federal courts, not just in copyright cases but in any case in which Congress has remained silent on how to choose an award within a statutory range.¹⁶³

Lower federal courts have varied as to whether, or how, they have reviewed awards of legislatively created remedies for excessiveness on nonconstitutional grounds. When confronted with a statute that does not prescribe any factors to inform the choice of amount within the statutory range, some courts correctly have implemented the absolutist language of *Douglas*, upholding the amount of the award as long as it was in the statutory range.¹⁶⁴ Other courts have said that their review is “even more deferential than abuse of discretion”¹⁶⁵ or

¹⁶² See *supra* notes 158–59 and accompanying text.

¹⁶³ In making this assertion, I do not deny that courts may create a list of non-exhaustive and non-mandatory factors—informed by the statutory text and structure—that may be considered by juries or trial judges in choosing an amount within the statutory range.

¹⁶⁴ See, e.g., *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113–14 (2d Cir. 2001) (upholding jury award of copyright statutory damages because it was within the statutory range); *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1195 (9th Cir. 2001) (finding district court did not abuse its discretion in denying defendant’s motion for a new trial due to allegedly excessive jury verdict because the jury’s \$31.68 million statutory damages award for copyright infringement was “well within the statutory range”); *SESAC, Inc. v. WPNT Inc.*, 327 F. Supp. 2d 531, 532 (W.D. Pa. 2003) (stating, in copyright statutory damages case, “there is no good reason for the court to interfere with the exercise of [the jury’s] fact finding where there is no claim that the jury was improperly instructed on the law”).

¹⁶⁵ See, e.g., *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996) (citing *Douglas* for the proposition that “[o]ur review of such an

“extremely narrow.”¹⁶⁶ A few courts have even applied the abuse of discretion standard, which *Douglas* rejected.¹⁶⁷ Courts that do not follow the no-review rule of *Douglas* have employed a variety of inquiries, examining whether the trial record supported the amount, whether the trial judge explained how the amount was determined, or whether the award complied with factors developed by the reviewing court.¹⁶⁸

With respect to “statutory damages”—a term Congress often uses when it creates a monetary remedy—the type of nonconstitutional review that courts have employed makes little difference in result. Courts almost never have deemed an award of statutory damages to have been excessive. A computerized search of federal appellate decisions that reviewed awards of “statutory damages”—when Congress had not specified factors to inform the selection of an amount within the statutory range—produced only one case that concluded the award was excessive.¹⁶⁹ In that case, the appellate court applied an abuse of

award is even more deferential than abuse of discretion”); *Broad. Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487–89 (7th Cir. 1995) (citing *Douglas* for the proposition that “reviewing an award of statutory damages within the allowed range is even more deferential than abuse of discretion,” and that “[t]he district court had almost unfettered discretion in setting its statutory damage award within the prescribed range”).

¹⁶⁶ *Morley Music Co. v. Dick Stacey’s Plaza Motel, Inc.*, 725 F.2d 1, 3 (1st Cir. 1983) (citing *Douglas* for the proposition that “[r]eview of a trial court’s decision [on the amount of statutory damages] is extremely narrow”).

¹⁶⁷ See, e.g., *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301, 1309–10 (9th Cir. 1990) (finding trial judge abused his discretion in awarding almost \$2 million in statutory damages in class action).

¹⁶⁸ See *Digital Filing Sys., L.L.C., v. Aditya Int’l*, 323 F. App’x 407, 420 (6th Cir. 2009) (stating that “as flexible and as discretionary as the statute may be, some explanation [by the trial court in choosing the amount of statutory damages] is required” and holding that, because the district court on remand had explained its choice of amount, “the district judge’s decision must be upheld” (alteration in original)); *Star Amusements*, 44 F.3d at 488–89 (explaining that “concerns of due process and the opportunity for meaningful, if limited, appellate review contemplate that the district court would provide *some* explanation of the factual findings that underlie this exercise of discretion to award greater than minimum statutory damages,” and then finding that the district court had adequately explained its decision) (internal quotation marks omitted); *Six Mexican Workers*, 904 F.2d at 1309–10 (stating that “in determining whether a particular award serves [the Farm Labor Contractor Registration Act’s] deterrence and compensation objectives, the court should consider: 1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant’s culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case”); *Morley Music*, 725 F.2d at 3 (stating “there must . . . be either some hearing or sufficient affidavits to give the trial judge an adequate reference base for his judgment” in assessing statutory damages and then holding that the record supported the district court’s award).

¹⁶⁹ My research assistant initially found that *Thomas-Rasset II* was the only federal decision to declare an award of statutory damages under the Copyright Act to be excessive on nonconstitutional grounds. 680 F. Supp. 2d 1045, 1053–55 (D. Minn. 2010). I then constructed several computerized queries to find decisions reviewing the amount of “statutory damages” awarded under other statutes. Several searches were performed at

discretion standard to the district judge's award, adopted court-created factors to guide its review, and seemed to have been heavily influenced by the class action context of the award.¹⁷⁰

With respect to trial judge review of a jury's award of "statutory damages," the *Thomas-Rasset* litigation apparently has produced the only reported decision in which a court found a jury's award to have been excessive on nonconstitutional grounds. As mentioned, the district judge applied the "shock the conscience" standard—a standard developed in the context of reviewing judicially created remedies for excessiveness. In selecting the standard of review, the district judge did not reference the no-review approach of *Douglas* nor any lower court decision discussing the proper review of legislatively created remedies.

On its face, a common law review standard such as "shock the conscience" or unreasonableness arguably is no more intrusive than the "even more deferential than abuse of discretion" or "abuse of discretion" standards that some lower courts have applied to awards of legislatively created remedies. However, the results of such review standards clearly are different. With common law review, judges often have set aside jury awards as excessive, particularly when damages were not mathematically certain.¹⁷¹ As I have demonstrated, review of "statutory damages" under the no-review, "even more

<http://www.lexis.com> in the U.S. Courts of Appeals, Combined database. The queries were: "(abuse pre/2 discretion) w/50 statutory damages and not copyright"; "statutory damages w/50 excessive and not copyright"; "statutory damages w/50 remit! and not copyright"; "(abuse pre/2 discretion) w/50 (statutory damages w/50 Lanham)"; "(excessive or remit! or reduce) w/50 (statutory damages w/50 Lanham)" (queries last performed Feb. 12, 2012 and Feb. 13, 2012). Other searches were performed at <http://www.lexis.com> in the U.S. District Courts, Combined database. Those searches were: "statutory damages w/50 remit! and not copyright"; "(excessive or remit! or reduce) w/50 (statutory damages w/50 Lanham)"; "(excessive or remit! or reduc!) w/50 statutory damages and not Lanham or copyright" (queries last performed Feb. 12, 2012 and Feb. 13, 2012). Beyond searching for "statutory damages," I searched whether any federal appellate court decision had deemed an award of "up to" treble damages to be excessive. I found none. This search was performed at <http://www.lexis.com> in the U.S. Courts of Appeals, Combined database for "trebl! w/15 excessive" (query last performed June 30, 2012).

¹⁷⁰ *Six Mexican Workers*, 904 F.2d at 1309–10 (declaring excessive trial judge's award of almost \$2 million dollars in statutory damages in class action, based on individual awards ranging from \$100 to \$500 for violations of the Farm Labor Contractor Registration Act); see also *id.* at 1309 (stating that "in determining whether a particular award serves FLCRA's deterrence and compensation objectives, the court should consider: 1) the amount of award to each plaintiff, 2) the total award, 3) the nature and persistence of the violations, 4) the extent of the defendant's culpability, 5) damage awards in similar cases, 6) the substantive or technical nature of the violations, and 7) the circumstances of each case").

¹⁷¹ See, e.g., Suja A. Thomas, *Re-examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 744–45 (2003) (finding 168 federal cases between 1991–2000 in which federal district courts granted a remittitur as an alternative to a new trial and that 68% of those cases involved "damages not calculable according to any formula").

deferential than abuse of discretion,” or abuse of discretion standards rarely has resulted in a finding of excessiveness. The standard of review for excessiveness that applies does indeed matter to outcome. Regardless of the review a court applies to the amount of a legislatively created remedy, the jury’s status under the Seventh Amendment dictates that review should be at least as deferential to a jury’s award as to a trial judge’s award.¹⁷²

The district judge’s nonconstitutional review decision in *Thomas-Rasset* shows what can go wrong when a court fails to appreciate the difference between reviewing the amount of judicially created remedies and reviewing the amount of bounded legislatively created remedies.¹⁷³ In applying a review standard that normally applies to judicially created remedies, the district judge failed to show appropriate deference to the jury and to Congress. Although the Copyright Act does not specify factors to guide the choice of an individual award within the statutory range and does not require plaintiffs to prove their actual damages, the district judge required that the amount of statutory damages bear some relation to actual damages.¹⁷⁴ Although Congress chose a wide monetary range for statutory damages in the Act—rather than enact an “up to” multiplier provision as it has in other statutes—the district judge decided that the maximum reasonable amount on the facts of the case was three times the statutory minimum.¹⁷⁵ Although the jury chose amounts within the statutory range, the judge deemed the jury’s decision to be “monstrous” and “shocking.”¹⁷⁶ Admittedly, the second jury’s \$1.92 million aggregate award against Thomas-Rasset for her illegal downloading and file sharing was large, but because the award per song was within the statutory range, the aggregate award should not have been set aside as excessive on nonconstitutional grounds.

¹⁷² See, e.g., *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113 (2d Cir. 2001) (stating that “we see no reason to apply a less deferential standard than the standard we use to review calculations by a trial judge”). In making this argument, I do not exclude the possibility that the judge could instruct the jury on a nonexhaustive, nonmandatory list of factors that may be considered in making an award, with the judge gleaned those factors from the text and structure of the statute. Cf. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 (1994) (“[P]roper jury instruction, is a well-established and, of course, important check against excessive awards.”).

¹⁷³ See *Thomas-Rasset II*, 680 F. Supp. 2d 1045, 1050–57 (D. Minn. 2010). Judge Zobel in *Tenenbaum* also applied a common law review standard to the jury’s award of statutory damages, but she concluded that the jury’s award was not excessive. See *supra* notes 81–86 and accompanying text. Thus, she reached the same result as would have been reached under the “no review” approach articulated in *Douglas* and advocated in this Article when Congress has not specified factors to guide the trial decisionmaker’s choice of award within the statutory range.

¹⁷⁴ *Thomas-Rasset II*, 680 F. Supp. 2d at 1049.

¹⁷⁵ *Id.* at 1056–57.

¹⁷⁶ *Id.* at 1049.

2. *Statutory Factors to Inform Choice within Range*

In a variety of statutes, Congress has chosen to specify factors that a court must consider in choosing an amount within the statutory range.¹⁷⁷ When enacting such factors, the intent of Congress is clear—the decisionmaker’s discretion is not unlimited within the statutory range. Rather, the statutory factors are to constrain the decisionmaker’s choice of an award. It then follows that Congress must intend judicial review for excessiveness, to insure that a trial decisionmaker does not violate the terms of the statute.

Regardless of who the initial trial decisionmaker is, the standard of excessiveness review should be whether the award was unreasonable in light of the statutory factors. If a trial judge is the initial decisionmaker on amount, the trial judge must make findings of fact and conclusions of law.¹⁷⁸ The appellate court may thus review whether the trial court applied the statutory factors properly and selected an amount tailored to those factors.¹⁷⁹ Courts sometimes have labeled this type of review as “abuse of discretion,” but essentially, it is review for whether the decision on amount was reasonable.¹⁸⁰ If a jury is the initial decisionmaker, the judge must instruct the jury on the statutory factors, but the judge likely will not know whether the jury considered and applied those factors unless the judge asks the jury to answer special questions.¹⁸¹ Review standards developed under the Seventh Amendment guarantee that the jury’s award may be set aside only if it is obviously unreasonable.¹⁸²

¹⁷⁷ In a variety of statutes, Congress has specified factors that are to inform the choice of award within the statutory range. *See, e.g.*, Truth in Lending Act, 15 U.S.C. § 1640(a) (2006) (allowing monetary recovery beyond actual damages in class actions in “such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery . . . shall not be more than the lesser of \$500,000 or 1 per centum of the net worth of the creditor” and specifying that “the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor’s failure of compliance was intentional”); Clean Water Act, 33 U.S.C. § 1319(d) (2006) (“In determining the amount of a civil penalty [up to \$25,000 per day per violation] the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.”).

¹⁷⁸ FED. R. CIV. P. 52(a)(1).

¹⁷⁹ An abuse of discretion standard encompasses review to insure that the trial court’s discretion was not guided by erroneous legal conclusions. *See, e.g.*, *Koon v. United States*, 518 U.S. 81, 100 (1996) (stating that “[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions”).

¹⁸⁰ For example, with respect to criminal sentencing under the Sentencing Guidelines, the Supreme Court has equated appellate review for abuse of discretion with appellate review for unreasonableness. *See infra* note 194 and accompanying text.

¹⁸¹ FED. R. CIV. P. 49.

¹⁸² *See supra* notes 137–40 and accompanying text.

As with awards of “statutory damages” for which Congress did not specify factors on how to choose within the monetary range, it is rare that a court will deem excessive an award of “statutory damages” for which Congress has specified such factors. A computerized search of federal appellate decisions revealed only one case in which a court found an award to be excessive in light of the factors that Congress had enacted.¹⁸³ The dearth of cases finding an award excessive suggests that even with factors specified in a statute, reviewing courts overwhelmingly defer to the initial decisionmaker’s choice of amount within the statutory range. In the single case that found an award excessive, the appellate court commented that only one of five factors specified by Congress was present, and the facts suggested that even that factor was less important than the others.¹⁸⁴ The appellate court then concluded that the trial judge’s award of statutory damages at half the statutory maximum was excessive.¹⁸⁵ This court’s approach is consistent with the standard I advocate here—that an appellate court may review whether the trial court applied the statutory factors correctly and chose an amount reasonable in light of the factors.

B. The Criminal Sanction Analogy for Nonconstitutional Review

I have argued thus far that the possibility of nonconstitutional excessiveness review of a legislatively created remedy depends on whether Congress has specified factors relevant to choosing the amount in an individual case. Analogizing to nonconstitutional review of federal sentencing decisions bolsters my argument. Like Congress’s creation of causes of action, Congress has enacted an array of federal criminal offenses. For these criminal offenses, Congress has created statutory ranges for the sanctions that may be imposed.¹⁸⁶ Criminal sanctions have punitive and deterrent purposes; legislatively created remedies often include these purposes. The question of the proper level of review in individual cases is common in both settings due to the fact that Congress has created both the offense/cause of action and defined the range of the sanction/remedy. Thus, it is illuminating to trace how federal courts have

¹⁸³ For the computerized searches I performed, see *supra* note 169.

¹⁸⁴ *Postow v. OBA Fed. Sav. & Loan Ass’n*, 627 F.2d 1370, 1384–85 (D.C. Cir. 1980) (reviewing statutory damages awarded by trial judge under Truth in Lending Act that specified “[the court shall] consider, among other relevant factors” five enumerated factors).

¹⁸⁵ *Id.* at 1385.

¹⁸⁶ A possible objection to analogizing review of criminal sentencing to review of legislatively created remedies is that historically, courts created common law crimes and punishments and that legislatures only later defined criminal offenses and prescribed statutory ranges. One could argue that this history resulted in a high degree of deference to court sentences within statutory ranges. Without a similar history, legislatively created remedies arguably are not analogous to criminal sanctions for purposes of discerning the proper level of judicial review. I suggest that the analogy nonetheless is fitting. When Congress defines a criminal offense and a minimum and maximum range of a sanction for the offense, it acts similarly to when it creates a statutory right and a minimum and maximum range of a monetary remedy for violation of the right.

handled nonconstitutional review of the severity of criminal sanctions imposed within statutory ranges.¹⁸⁷ The approaches taken by courts in this context parallel the proposal that I have made with respect to reviewing awards of legislatively created remedies.

1. *No Statutory Factors to Inform Choice within Range*

Until the mid-1980s, Congress typically delegated the choice of sentences within very broad statutory ranges to “the discretion of the court.”¹⁸⁸ Congress did not specify factors that were to inform the trial judge’s selection of an individual sanction within the statutory range. The trial judge’s choice of sentence within the range was highly discretionary and appellate review of the trial judge’s choice was virtually nonexistent.¹⁸⁹ As the Supreme Court stated: “We begin with the general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end.”¹⁹⁰ By contrast, in the context of criminal contempt sanctions—sanctions historically created by courts—appellate courts could review the trial judge’s selection of a sanction under an

¹⁸⁷ Indeed, the Supreme Court itself has drawn parallels between the discretion involved in criminal sentencing and the awarding of civil remedies, specifically punitive damages. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 505–07 (2008) (noting the “uncharted discretion” inherent in “indeterminate” sentencing schemes and in the setting of punitive damages and how federal and state sentencing moved to “guideline” systems).

¹⁸⁸ *See* KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 13 (1998).

¹⁸⁹ *See* *Koon v. United States*, 518 U.S. 81, 96 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”); *see also* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1445–46 (1997) (discussing that in indeterminate sentencing schemes, trial judges had enormous discretion to sentence within the statutory maximum and that there were few legal principles against which a sentence could be reviewed); STITH & CABRANES, *supra* note 188, at 9 (“For over two hundred years, there was virtually no appellate review of the federal trial judge’s exercise of sentencing discretion.”). Appellate courts could, however, review for clear factual error or unconstitutionality of the sentence. *See* Carissa B. Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 4 (2008) (stating that appellate courts could review for the possibility that the trial court based its sentencing decision on “material misinformation . . . or upon constitutionally impermissible considerations,” such as race) (quoting *United States v. Colon*, 884 F.2d 1550, 1552 (2d Cir. 1989)); Reitz, *supra*, at 1443 (noting that prior to sentencing guidelines, the few appellate decisions that existed dealt primarily with constitutional issues).

¹⁹⁰ *Dorszynski v. United States*, 418 U.S. 424, 431 (1974). The Supreme Court did not in *Dorszynski* explain the genesis of the rule against nonconstitutional review of a sentence imposed within a statutory range. The cases that *Dorszynski* cited for the proposition also did not offer an explanation. Some scholars have suggested that the rule was the result of an assumption that Congress did not intend appellate review of criminal sentences when it enacted an 1891 federal statute creating the circuit courts of appeals. *See* STITH & CABRANES, *supra* note 188, at 197 n.3.

abuse of discretion standard.¹⁹¹ The differing review standards for sentencing within statutory ranges compared to sentencing for unbounded criminal contempt are analogous to the differing review standards that I have advocated for legislatively created remedies compared to judicially created remedies. Given congressional boundaries for criminal sanctions with no other statutory factors to inform the sentence in an individual case, appellate courts essentially did not review the trial judge's choice of sanction. By contrast, as shown earlier, some federal courts have been willing to review the amount of a legislatively created remedy awarded within a statutory range when Congress did not specify factors to inform the choice of amount in particular cases. It seems unjustifiable that courts have pursued more intrusive review of highly discretionary legislatively created remedies than was allowed for the review of highly discretionary criminal sanctions.

The analogy to appellate review of an individual sentence translates easily to the context of appellate review of a trial judge's award of a legislatively created remedy within a statutory range. When the context is trial judge review of a jury's award of a legislatively created remedy, however, one might argue that the analogy is inapt. The trial judge, not the jury, determined the individual sentence within a congressional range. Appellate court review was on a cold paper record. By contrast, the trial judge who reviews a jury award has seen the same evidence as the jury.

The criminal sanction analogy remains pertinent for two reasons. First, the no-review stance that appellate courts took with respect to the severity of a sentencing decision applied even when the defendant had pleaded guilty before trial. In such a circumstance, the sentencing decision was largely made without live testimony, making the "cold paper record" explanation for appellate deference less apt. Second, due to the Seventh Amendment, deference to jury decisions within a statutory range should be at least as deferential, if not more so, than appellate court deference to trial judge decisions within a statutory range.

2. Statutory Factors to Inform Choice within Range

With the federal Sentencing Reform Act, initially enacted in 1984, Congress specified that a federal judge's sentencing within a statutory range is to be informed by a variety of statutory factors, including: the nature and circumstances of the offense and the history and characteristics of the defendant; the advisory sentencing range under the Federal Sentencing Guidelines; the need for the sentence imposed to reflect the seriousness of the offense and to afford adequate deterrence; the need to avoid unwarranted sentencing disparities; the need to protect the public from further crimes of the

¹⁹¹ See *Green v. United States*, 356 U.S. 165, 188 (1958) (noting that "in the areas where Congress has not seen fit to impose limitations on the sentencing power for contempts" appellate courts have the power to review trial court's sentence for abuse of discretion).

defendant; and the need to provide victim restitution.¹⁹² The Sentencing Reform Act instructs courts to “impose a sentence sufficient, but not greater than necessary, to comply with” the sentencing purposes set forth in the Act.¹⁹³

The Supreme Court has since held that all federal sentences, whether within or outside the applicable Guidelines range, are subject to appellate review under an abuse of discretion standard for whether the sentence is reasonable.¹⁹⁴ After excising, for unconstitutionality, portions of the Sentencing Reform Act that made sentencing within the Federal Guidelines mandatory, the Court reasoned that the Act implicitly set forth the reasonableness standard of review. The Court stated that this standard could be inferred from “statutory language, the structure of the statute, and the sound administration of justice.”¹⁹⁵

Apart from the Court’s reasoning, I suggest that appellate review for the reasonableness of a sentence is warranted because, unlike in the past, Congress has specified factors that guide the trial judge’s selection of a sentence within the statutory range. So, too, should reasonableness review apply to legislatively created remedies when Congress has specified statutory factors to inform the selection of the remedy in an individual case.

I have argued that a reviewing court may declare a legislatively created remedy to be excessive on nonconstitutional grounds only when the award is unreasonable in light of any factors that Congress enacted to guide the selection of amount within the statutory range. A reviewing court does not otherwise have the power to review the amount for excessiveness. This approach to nonconstitutional review might leave untouched a seemingly harsh award in a particular case. Such a harsh award, however, would be the result of a trial decisionmaker’s compliance with the statutory scheme. Congress could respond by revising the statute. Possibilities include lowering the maximum amount allowed for a statutory violation, imposing an aggregate maximum when defendants have committed multiple violations of the statute, or prescribing statutory factors to guide the choice of amount within the statutory range.

¹⁹² 18 U.S.C. § 3553(a) (2006) (titled “[f]actors to be considered in imposing a sentence”).

¹⁹³ *Id.*

¹⁹⁴ See *Gall v. United States*, 552 U.S. 38, 51 (2007) (asserting that federal sentences are subject to appellate review for “the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard”); *United States v. Booker*, 543 U.S. 220, 260–62 (2005) (concluding that the Sentencing Reform Act implied an appellate review standard of unreasonableness after the Court excised, for unconstitutionality, portions of the Act that made sentencing within the Federal Guidelines mandatory).

¹⁹⁵ *Booker*, 543 U.S. at 260–61 (internal quotation marks omitted).

IV. CONSTITUTIONAL REVIEW OF LEGISLATIVELY CREATED REMEDIES

If a reviewing court deems an award of a congressionally created remedy within an applicable statutory range to be unconstitutionally excessive, the necessary corollary is that the reviewing court has deemed the act to be unconstitutional as applied. The Supreme Court has asserted repeatedly that an act of Congress is entitled to a strong presumption of constitutionality.¹⁹⁶ Thus, constitutional review for the possible excessiveness of a particular award must give proper regard to the congressional judgment creating the monetary boundaries of the legislative remedy.

Constitutional review should be guided by the Supreme Court's decision in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*,¹⁹⁷ which indicated that a legislatively created monetary remedy violates due process only if it is "wholly disproportioned" to the statutory offense.¹⁹⁸ This standard is similar to one that the Supreme Court has applied under the Excessive Fines Clause to penalties payable to the government.¹⁹⁹ The deferential manner in which federal courts have applied the Excessive Fines Clause is helpful guidance for how federal courts should apply the *Williams* standard.²⁰⁰ By contrast, Supreme Court doctrine on due process review of punitive damages should not translate to legislatively created remedies, because the two types of remedies differ in fundamental respects.²⁰¹ With respect to aggregated awards of legislatively created remedies, I suggest that in rare circumstances, an aggregated award may be unconstitutionally excessive even though the award per statutory violation is not.

A. *The Williams Standard and Its Application*

The leading, and most recent, Supreme Court opinion addressing a due process challenge to the amount of a legislatively created remedy is the unanimous decision in *Williams*.²⁰² A state statute allowed an intrastate railroad

¹⁹⁶ See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 28 (2005) (stating, in an as-applied challenge to a federal statute, that the "congressional judgment" at issue was "entitled to a strong presumption of validity"); *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963) (asserting, in an as-applied vagueness challenge to a federal statute, that there is a "strong presumptive validity that attaches to an Act of Congress").

¹⁹⁷ 251 U.S. 63 (1919).

¹⁹⁸ *Id.* at 67; see also *infra* Part IV.A.

¹⁹⁹ See *infra* Part IV.B.

²⁰⁰ See *id.*

²⁰¹ See *infra* Part IV.C.

²⁰² *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). Prior to *Williams*, the Supreme Court confronted constitutional challenges, principally under due process or equal protection, to the amount of legislative awards or penalties, but, like *Williams*, none of these cases found the amounts unconstitutional. See *Standard Oil Co. v. Missouri*, 224 U.S. 270, 285, 290 (1912) (upholding fine imposed pursuant to state statute providing penalty between \$5 and \$100 against due process and equal protection

passenger to collect a remedy of “not less than fifty dollars, nor more than three hundred dollars” if the passenger had been charged a fare exceeding statutory rates.²⁰³ The defendant railroad company overcharged the two plaintiffs by sixty-six cents. The plaintiffs each won a judgment within the statutory range—seventy-five dollars—plus the amount of the overcharge, costs, and an attorney’s fee of twenty-five dollars.²⁰⁴ The defendant appealed, asserting that the statutory provision violated the due process clause of the Fourteenth Amendment.²⁰⁵

The Supreme Court rejected the facial due process challenge. Characterizing the statutory provision as “essentially penal, because primarily intended to punish the carrier for taking more than the prescribed rate,” the Court reasoned that the legislature has wide latitude in determining amounts to punish violations of the law.²⁰⁶ Although the Court referred in the opinion to the statute as creating a “penalty,” the statutory provision created a legislative “remedy” as this Article uses the term, because private plaintiffs would recover under the statute.²⁰⁷ The *Williams* Court rejected the argument that due process required that the statutory remedy be proportioned to plaintiff harm. The Court explained:

challenges); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111–12 (1909) (stating that “[w]e can only interfere with such legislation and judicial action of the States enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law” and upholding statutory penalties assessed by jury at \$1,500 and \$50 a day for violation of state antitrust laws); *Seaboard Air Line Ry. v. Seegers*, 207 U.S. 73, 78 (1907) (stating that “there are limits beyond which penalties may not go” but upholding state statute against equal protection challenge that imposed a penalty of \$50 for a common carrier’s failure to pay for property loss within prescribed time period; noting also that even though penalty was large compared to value of the actual shipment, “it must be remembered that small shipments are the ones which especially need the protection of penal statutes like this”); *Coffey v. Cnty. of Harlan*, 204 U.S. 659, 665 (1907) (asserting that state statute imposing penalty for double the amount embezzled did not “disclose[] any violation of a right secured by the Constitution of the United States”); *Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 522–23 (1885) (upholding against due process challenge a state statute that allowed plaintiffs to recover double the amount of their damages sustained as a result of a railroad’s failure to maintain adequate fences of cattle-guards). The Supreme Court prior to *Williams* did strike down under due process some rate statutes that imposed significant penalties for charging in excess of statutory rates, but the rationale of the Court was that the defendant did not have the procedural opportunity to challenge the legality of the rates before overcharging. *See Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 419 (1915); *Mo. Pac. Ry. Co. v. Tucker*, 230 U.S. 340, 351 (1913). In upholding the statutory range in *Williams*, the Court noted that the defendant did have the opportunity to challenge the rates. 251 U.S. at 64–65.

²⁰³ *Williams*, 251 U.S. at 64.

²⁰⁴ *Id.* The opinion does not indicate whether the initial assessor of the penalty was a judge or a jury.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 66.

²⁰⁷ *Id.* at 66–67; *see also supra* notes 98–100 and accompanying text.

[G]iving the penalty to the aggrieved passenger [does not] require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the legislature may adjust its amount to the public wrong rather than the private injury.²⁰⁸

Williams did not, however, insulate legislative judgments about remedy from judicial review. The Court acknowledged that the Due Process Clause of the Fourteenth Amendment “places a limitation upon the power of the States to prescribe penalties for violations of their laws.”²⁰⁹ The Court, however, adopted a highly deferential review standard with respect to the constitutionality of a monetary remedy enacted by the legislature: “[E]nactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”²¹⁰ In rejecting the facial challenge to the statute, the Court considered the public interest, the numerous opportunities for overcharging passengers, and the need for uniform adherence to legislatively established passenger rates.²¹¹ These considerations led the Court to conclude that the statute was not “wholly disproportioned to the offense or obviously unreasonable.”²¹²

Although *Williams* involved a facial challenge to a statute, it did not preclude an as-applied challenge to an amount imposed in an individual case.²¹³ Indeed, prior to *Williams*, the Supreme Court had previously entertained an as-applied due process challenge to a civil penalty payable to the state that the jury

²⁰⁸ *Id.*; see also *id.* at 67 (“When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way.”). Judge Zobel in *Tenenbaum II* emphasized this element of *Williams* in upholding the jury’s award. She noted that Congress considered harms to the public from copyright infringement when it increased the amounts of statutory damages available. *Tenenbaum II*, No. 07-11446-RWZ, 2012 WL 3639053, slip op. at *5–6 (D. Mass. Aug. 23, 2012).

²⁰⁹ *Williams*, 251 U.S. at 66.

²¹⁰ *Id.* at 66–67.

²¹¹ *Id.* at 67.

²¹² *Id.*

²¹³ The Supreme Court later cited *Williams* for the proposition that “[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme.” *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989). For cases involving as-applied challenges under *Williams*, see, for example, *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587–88 (6th Cir. 2007) (stating that under *Williams*, “we inquire whether the awards” violate due process and upholding district judge’s award of copyright statutory damages); *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (citing *Williams* and upholding award that resulted from automatic trebling statutorily required under the National Health Service Corps Scholarship); *Thomas-Rasset III*, 799 F. Supp. 2d 999, 1004 (D. Minn. 2011) (“Under *Williams*, an award of statutory damages satisfies due process [if it is not] . . . wholly disproportioned to the offense or obviously unreasonable.”).

imposed within a statutory range.²¹⁴ In that case, the Court rejected the argument that the penalty imposed violated due process, employing a standard equivalent to *Williams*, although with slightly different wording:

The fixing of . . . penalties for unlawful acts against its laws is within the police power of the State. We can only interfere with such legislation and judicial action of the States enforcing it *if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law*.²¹⁵

Williams seemingly approved a very high ratio between the legislatively created remedy and potential plaintiff harm. The Court upheld the statutory maximum of \$300, which would apply even if the overcharge was unintentional and only in the amount of one cent.²¹⁶ The Court deemed irrelevant the potentially large ratio between the legislatively created remedy and the harm to a plaintiff: "When the penalty is contrasted with the overcharge possible in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way."²¹⁷

Between *Williams* and the district court's constitutional review opinion in *Thomas-Rasset*,²¹⁸ apparently no reported federal decision had upheld a facial challenge to legislatively created remedies for excessiveness under due process.²¹⁹ Moreover, apparently no reported federal decision had found a particular award of a legislatively created remedy to be excessive under the *Williams* standard. The Eighth Circuit in *Thomas-Rasset* reasoned that the

²¹⁴ *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 100, 111–12 (1909) (upholding against due process challenge a jury's assessment of \$1,500 per day within statutory range of \$200–\$5,000, and a fixed statutory amount of \$50 per day, both payable to the state). *Waters-Pierce* was decided under the Due Process Clause of the Fourteenth Amendment; the defendant had not raised a challenge under the Excessive Fines Clause of the Eighth Amendment. *Id.* at 111. It appears that the Supreme Court has since made the Excessive Fines Clause applicable to the states via the Fourteenth Amendment. *See infra* note 230.

²¹⁵ *Waters-Pierce*, 212 U.S. at 111 (emphasis added).

²¹⁶ *See Williams*, 251 U.S. at 66–67.

²¹⁷ *Id.* at 67.

²¹⁸ *Thomas-Rasset III*, 799 F. Supp. 2d 999 (D. Minn. 2011).

²¹⁹ For relatively recent federal cases rejecting facial challenges under the *Williams* standard, see, for example, *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1312–13 (11th Cir. 2009) (holding that statutory damages range between \$100 and \$1000 under the federal Fair Credit Report Act was not unconstitutionally excessive on its face); *Green v. Anthony Clark Int'l Ins. Brokers, Ltd.*, No. 09 C 1541, 2010 WL 431673, at *6 (N.D. Ill. Feb. 1, 2010) (holding that statutory damages range of \$500 to \$1,500 per fax under Telephone Consumer Protection Act was not excessive under *Williams*); *Follman v. Vill. Squire, Inc.*, 542 F. Supp. 2d 816, 821–22 (N.D. Ill. 2007) (stating that maximum statutory damages of \$1,000 per violation of the federal Fair and Accurate Credit Transactions Act would not be excessive under *Williams*); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (rejecting facial challenge to state statute allowing "up to \$500" penalty against employers).

\$222,000 aggregate award of statutory damages was consistent with *Williams* because of the public interest in protecting copyrights, the numerous opportunities for committing online copyright infringement, and the fact that the \$9,250 award per song was at the lower end of the statutory range.²²⁰ It also cited *Williams* for the proposition that an award of statutory damages need not be compared to the actual damages caused by the statutory violation.²²¹ In upholding other awards of legislatively created remedies under *Williams*, courts have asserted that maximum statutory amounts may be awarded even in the absence of pecuniary loss²²² and that awards need not be proportional to any actual loss.²²³ In applying *Williams*, courts have imposed or upheld very large awards of “statutory damages.”²²⁴

When should a legislatively created remedy be considered to transgress the *Williams* threshold of “wholly disproportioned to the offense and obviously unreasonable”?²²⁵ *Williams* gave few clues to answering this due process question. I suggest that guidance can be found in an analogous line of doctrine—that determining when monetary penalties payable to the government violate the Excessive Fines Clause.

²²⁰ *Capitol Records, Inc. v. Thomas-Rasset*, Nos. 11-2820, 11-2858, 2012 WL 3930988, at *8–10 (8th Cir. Sept. 11, 2012).

²²¹ *Id.* at *10.

²²² See, e.g., *Follman*, 542 F. Supp. 2d at 821–22 (stating that possible maximum statutory damages of \$1,000 for a single violation of the Fair and Accurate Credit Transactions Act would not be excessive under *Williams*, even when plaintiff had not suffered pecuniary loss); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (same).

²²³ See, e.g., *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 825, 835 (D. Md. 2011) (discussing facial challenge to the federal Telephone Consumer Protection Act and citing language from *Williams* for the proposition that statutory damages under “need not be proportional to the cost associated with unsolicited faxes”); see also *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 578, 588 (6th Cir. 2007) (upholding award of copyright statutory damages and noting that *Williams* itself allowed an award that represented a 113-to-1 ratio of statutory penalty to actual harm).

²²⁴ See, e.g., *Zomba Enters.*, 491 F.3d at 578, 588 (upholding \$806,000 in statutory damages for copyright infringement, with a 44 to 1 ratio of statutory damages to lost licensing fees); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C 07-03952 JW, 2010 WL 5598337, at *1, *12–14 (N.D. Cal. Mar. 19, 2010) (upholding jury’s award of more than \$10 million in statutory damages for trademark and copyright infringement against various defendants, including an individual); *Facebook, Inc. v. Wallace*, No. C 09-798 JF (RS), 2009 WL 3617789, at *1–2 (N.D. Cal. Oct. 29, 2009) (imposing statutory damages of over \$700 million at \$50 per violation for compromising accounts of Facebook users in violation of the federal Controlling the Assault of Non-Solicited Pornography and Marketing Act); *Verizon Cal. Inc. v. OnlineNIC, Inc.*, No. C 08-2832 JF (RS), 2009 WL 2706393, at *6–7, *9 (N.D. Cal. Aug. 25, 2009) (imposing \$33.15 million in statutory damages at \$50,000 per violation of the federal Anticybersquatting Consumer Protection Act).

²²⁵ *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

B. *The Excessive Fines Clause Analogy*

The Eighth Amendment provides that: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²²⁶ The Supreme Court has commented that “the primary focus of the [Excessive Fines Clause] was the potential for governmental abuse of its ‘prosecutorial’ power, not concern with the extent or purposes of civil damages.”²²⁷ In so commenting, the Court observed that the Excessive Fines Clause is identical to a provision in the English Bill of Rights of 1689.²²⁸ The English version was a reaction to huge fines that were imposed on the king’s opponents, with the result that persons often languished in prison because of their inability to pay the fines.²²⁹

With this historical understanding, the Supreme Court has held that the Excessive Fines Clause constrains the amount of payments to the government²³⁰ that are at least partially punitive; solely “remedial” payments to the government are not covered by the Clause.²³¹ The Excessive Fines Clause covers payments that are either in cash or in kind,²³² and thus it applies not only to traditional monetary fines or penalties but also to forfeiture of assets, as long

²²⁶ U.S. CONST. amend. VIII (emphasis added).

²²⁷ *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989); see also *id.* (“The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government.”).

²²⁸ *Id.*

²²⁹ See *id.* at 267.

²³⁰ The Excessive Fines Clause apparently applies not only to the federal government, but also to the states via the Fourteenth Amendment. See *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (“The Eighth Amendment, applicable to the States through the Fourteenth Amendment . . . proscribes ‘all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive.’”); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001) (“[T]he Due Process Clause of the Fourteenth Amendment . . . makes the Eighth Amendment’s prohibition against excessive fines and cruel and unusual punishments applicable to the States.”). But see *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 n.13 (2010) (“We never have decided whether . . . the Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.”).

²³¹ See *United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998) (noting that a forfeiture that is “punitive in part” is “sufficient to bring the forfeiture within the purview of the Excessive Fines Clause”); *Austin v. United States*, 509 U.S. 602, 610 (1993) (“We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause. We, however, must determine that it can only be explained as serving in part to punish.”). Lower federal courts reject challenges under the Excessive Fines Clause if the payment to the Government is solely remedial. See, e.g., *Gupton v. Leavitt*, 575 F. Supp. 2d 874, 882 (E.D. Tenn. 2008). If the government seeks compensatory damages only, nonconstitutional review for excessiveness under common law standards is available.

²³² *Austin*, 509 U.S. at 609–10 (“The Excessive Fines Clause limits the government’s power to extract payments, whether in cash or in kind, ‘as *punishment* for some offense.’” (quoting *Browning-Ferris*, 492 U.S. at 265)).

as the monetary sanction or forfeiture is at least partially punitive.²³³ The Clause applies whether the payment to the government is considered a civil or criminal sanction.²³⁴ The Clause does not extend to remedies or penalties that private litigants, rather than the government, would recover.²³⁵

The Supreme Court has only once found a violation of the Excessive Fines Clause, in the 1998 decision *United States v. Bajakajian*.²³⁶ The context was criminal forfeiture of assets, rather than a traditional statutory fine.²³⁷ In *Bajakajian*, the federal government sought forfeiture of over \$357,000 in currency, which was the amount the defendant was seeking to transport out of the United States.²³⁸ A federal statute requires that a person seeking to leave the United States must report to authorities if he or she is transporting more than \$10,000 in currency.²³⁹ *Bajakajian* pleaded guilty to violating that statute.²⁴⁰ A separate forfeiture statute provided that a person convicted of willfully violating the reporting statute (as well as many other statutory criminal offenses) shall forfeit “any property . . . involved in such [an] offense.”²⁴¹ This statute mandated total forfeiture of any property involved in the offense; Congress imposed no boundaries on the amount or value of the property to be forfeited.

In a 5–4 decision, the Supreme Court held that forfeiture of the approximately \$357,000, given the circumstances of the case, violated the

²³³ *Id.* at 609–10, 613–14, 618, 622 (holding that the Excessive Fines Clause applied to civil *in rem* forfeiture because the forfeiture contained a punitive component); *Alexander v. United States*, 509 U.S. 544, 558–59 (1993) (concluding that the Excessive Fines Clause applies to criminal forfeitures because such forfeitures are “clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional ‘fine’”); *see also* *United States v. Ursery*, 518 U.S. 267, 281, 287 (1996) (finding that statutory civil forfeiture provision constituted punishment under the Excessive Fines Clause but not under the Double Jeopardy Clause).

²³⁴ *See, e.g., Austin*, 509 U.S. at 610, 618–22 (holding that the Excessive Fines Clause applied to civil *in rem* forfeiture).

²³⁵ *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 504–05 n.18 (2008) (stating that the Excessive Fines Clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded” (internal quotation marks omitted)). The Supreme Court specifically has held that the Excessive Fines Clause does not apply to awards of punitive damages to private parties. *Browning-Ferris*, 492 U.S. at 275. The Court left open in *Browning-Ferris* whether the Excessive Fines Clause applies to awards in *qui tam* suits, in which a private plaintiff litigates in the government’s interest and the private plaintiff and the government share any recovery. *Id.* at 276 n.21. The Supreme Court also has not addressed whether the Excessive Fines Clause applies to punitive damages awards in which the government would be entitled to a share of the punitive award. *See Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 179–80 n.232 (1995).

²³⁶ *Bajakajian*, 524 U.S. at 339–40, 343–44.

²³⁷ *Id.* at 321.

²³⁸ *Id.*

²³⁹ 31 U.S.C. § 5316(a)(1)(A) (2006).

²⁴⁰ *Bajakajian*, 524 U.S. at 321.

²⁴¹ 18 U.S.C. § 982(a)(1) (2006).

Excessive Fines Clause.²⁴² The standard the majority announced in reaching its holding was that “a punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant’s offense.”²⁴³ The majority explicitly drew this “grossly disproportional” standard from its precedents under the Cruel and Unusual Punishment Clause,²⁴⁴ but the *Bajakajian* standard also echoes the “wholly disproportioned to the offense” standard announced by the *Williams* court eight decades earlier. The *Bajakajian* majority rejected a requirement of strict proportionality between the amount of a punitive forfeiture and the gravity of the offense, asserting that “judgments about the appropriate punishment for an offense belong in the first instance to the legislature” and that “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise.”²⁴⁵

In considering whether the forfeiture was unconstitutionally excessive, the Court first assessed the gravity of the defendant’s offense. In so doing, the Court considered the culpability of the defendant and the actual and potential harm to the government and the public from the defendant’s conduct.²⁴⁶ With respect to the defendant’s culpability, the Court found it “minimal” for three reasons.²⁴⁷ First, his crime was solely a reporting offense and unrelated to any other illegal activity.²⁴⁸ Second, the defendant did “not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader.”²⁴⁹ Third, the maximum penalties applicable under the Sentencing Guidelines—six months imprisonment and a fine of \$5,000—“confirm[ed] a minimal level of culpability.”²⁵⁰ The Court added that “[i]n considering an offense’s gravity, the other penalties that the Legislature has authorized are certainly relevant evidence,” and it noted that

²⁴² *Bajakajian*, 524 U.S. at 323, 337.

²⁴³ *Id.* at 334. The Court added that judicial review is de novo of whether a payment would violate the Excessive Fines Clause, with factual findings made by the district court in conducting the excessiveness inquiry accepted unless clearly erroneous. *Id.* at 336–37 & n.10.

²⁴⁴ *See id.* at 336.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 336–39.

²⁴⁷ *Id.* at 337–39.

²⁴⁸ *Bajakajian*, 524 U.S. at 337–38. The majority also observed that under the Sentencing Guidelines, the maximum sentence that could have been imposed on *Bajakajian* for the reporting offense was six months imprisonment and a \$5,000 fine, suggesting a minimal level of culpability. *Id.* at 338–39. In a footnote, the majority acknowledged that Congress had authorized a maximum fine of \$250,000 and five years’ imprisonment, and that “this suggests that [Congress] did not view the reporting offense as a trivial one.” *Id.* at 339 n.14. However, the majority reasoned that because “the maximum fine and Guideline sentence to which [defendant] was subject were but a fraction of the [statutory] penalties authorized,” the defendant’s culpability was “small indeed” compared “to other potential violators of the reporting provision.” *Id.*

²⁴⁹ *Id.* at 338.

²⁵⁰ *Id.* at 338–39.

Congress had “authorized a maximum fine of \$250,000 plus five years’ imprisonment for willfully violating the statutory reporting requirement.”²⁵¹ These statutory maximums, however, were less relevant to the Court than the maximums under the Sentencing Guidelines, because the latter “show that the [defendant’s] culpability relative to other potential violators of the reporting provision . . . is small indeed.”²⁵²

After finding that the defendant’s culpability was minimal, the Court likewise characterized the harm that the defendant caused as minimal.²⁵³ The actual harm that resulted was “minor” because “[t]here was no fraud on the United States, and . . . no loss to the public fisc.”²⁵⁴ With respect to potential harm if the offense had not been detected, the Court stated that the government “would have been deprived only of the information that [the defendant’s money] had left the country.”²⁵⁵ Thus, the degree of culpability and the actual and potential harm from the defendant’s conduct indicated that the defendant’s offense was not very serious.

Having assessed the gravity of the defendant’s offense, the Court then determined that the amount of the forfeiture was grossly disproportional to his offense.²⁵⁶ The Court’s proportionality inquiry depended in part on comparing the amount of the forfeiture to the amount of the other monetary sanction imposed by the district court: the forfeiture amount was larger “by many orders of magnitude” than the \$5,000 criminal fine imposed for the reporting offense violation.²⁵⁷ Although the Court did not explain the relevance of this comparison, a possible justification is that the \$5,000 criminal fine—the maximum allowed under the Guidelines—was a mathematical measure of the gravity of the offense, and the \$357,144 forfeiture was grossly disproportionate to that amount. The Court’s proportionality inquiry also compared the amount of the forfeiture to the harm caused by the defendant, with the Court concluding that the forfeiture amount bore “no articulable correlation to any injury suffered by the Government.”²⁵⁸

It is significant that *Bajakajian* involved not a fine within monetary boundaries set by Congress, but rather a forfeiture of assets that happened to be money. It was only in 1970 that Congress began to authorize criminal forfeiture, and it did so initially to combat organized crime and major drug trafficking.²⁵⁹

²⁵¹ *Id.* at 339 n.14.

²⁵² *Id.*

²⁵³ *Id.* at 339.

²⁵⁴ *Bajakajian*, 524 U.S. at 339.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 339–40.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 340.

²⁵⁹ *Id.* at 332 n.7 (“It was only in 1970 that Congress resurrected the English common law of punitive forfeiture to combat organized crime and major drug trafficking. . . . In providing for this mode of punishment, which had long been unused in this country, the Senate Judiciary Committee acknowledged that ‘criminal forfeiture . . . represents an

Criminal forfeiture differed drastically from other penalties Congress had previously authorized in two ways: Congress imposed no boundaries on the amount or value of assets to be forfeited, and Congress authorized forfeiture for a dizzying array of criminal offenses that varied substantially in terms of their seriousness.

Outside forfeiture of assets, apparently no reported decision of any federal appellate court has invalidated, under the Excessive Fines Clause, the amount of a penalty imposed within legislative boundaries.²⁶⁰ In rejecting all challenges under the Excessive Fines Clause to the amount of fines imposed within legislative boundaries, the federal appellate courts have taken a variety of approaches. Some have simply tracked the constitutional standard announced in *Bajakajian*, asserting that the fine at issue was proportional to the gravity of the defendant's offense.²⁶¹ Some have expressed the view that if a monetary fine is within the boundaries set by the legislature, the fine does not violate the Excessive Fines Clause.²⁶² To illustrate, the Seventh Circuit has stated: "[W]e can't say the fine is grossly disproportionate to the gravity of the offense when Congress has made a judgment about the appropriate punishment."²⁶³ The Fifth Circuit has asserted: "[N]o matter how excessive (in lay terms) an

innovative attempt to call on our common law heritage to meet an essentially modern problem.'" (citation omitted) (second omission in original)).

²⁶⁰ A query for appellate court cases addressing whether a fine violated the Excessive Fines Clause was constructed. WESTLAWNEXT, <http://next.westlaw.com> (select "Citing References" for the Eighth Amendment; limit display to Courts of Appeals cases and search within for "excessive fines") (query last performed July 23, 2011).

²⁶¹ See, e.g., *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 821–22 (11th Cir. 2009) (upholding \$700,000 fine that was the accumulation of daily fines and stating "[r]ather than being grossly disproportionate to the offense, the \$700,000 fine is, literally, directly proportionate to the offense"); *United States v. Phillips*, 327 F. App'x 855, 860 (11th Cir. 2009) (upholding fine "because there is no evidence that it was disproportionate" to the defendant's offense); *Noriega-Perez v. United States*, 179 F.3d 1166, 1170 n.1 (9th Cir. 1999) (reasoning that the fine of \$96,000 for possessing and counterfeiting over 300 fraudulent documents "is hardly 'grossly disproportional' to the gravity of" the defendant's offense); *Pharaon v. Bd. of Governors of the Fed. Reserve Sys.*, 135 F.3d 148, 148, 156–57 (D.C. Cir. 1998) (rejecting Eighth Amendment challenge to \$37 million fine because "the penalty is proportional to [the defendant's] violation[s]" of Bank Holding Company Act).

²⁶² See, e.g., *Gonzalez v. U.S. Dep't of Commerce Nat'l Oceanic & Atmospheric Admin.*, 420 F. App'x 364, 370 (5th Cir. 2011) ("[N]o matter how excessive (in lay terms) an administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment." (internal quotation marks omitted)); *Moustakis*, 338 F. App'x at 821 ("The \$150 per day fine that has accrued for 14 years and now totals \$700,000 is within the range of fines prescribed by the Florida Legislature and accordingly is due our substantial deference."); *Kelly v. U.S. EPA*, 203 F.3d 519, 524 (7th Cir. 2000) ("[W]e can't say the fine is grossly disproportionate to the gravity of the offense when Congress has made a judgment about the appropriate punishment."); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1193 (3d Cir. 1984) ("Although [defendant's] one million dollar fine is substantial, its amount was the expression of the Congress, not the judiciary.").

²⁶³ *Kelly*, 203 F.3d at 524.

administrative fine may appear, if the fine does not exceed the limits prescribed by the statute authorizing it, the fine does not violate the Eighth Amendment.”²⁶⁴ In suggesting that traditional fines imposed within monetary limits set by Congress cannot violate the Excessive Fines Clause, these two decisions seemingly confine the analysis in *Bajakajian* to asset forfeiture.

Other federal appellate courts have less starkly deferred to the legislature, justifying their rejection of the Excessive Fines Clause challenge in part because the award was well below the statutory limit²⁶⁵ or a fraction of the statutory limit.²⁶⁶ Beyond emphasizing that an individual fine was within the statutory limits, appellate courts have also mentioned the proportionality of the fine to the harm inflicted (explicitly considered in *Bajakajian*),²⁶⁷ the actual or potential

²⁶⁴ *Gonzalez*, 420 F. App’x at 370 (quoting *Newell*, 231 F.3d at 210).

²⁶⁵ See, e.g., *Van Salisbury v. United States*, 368 F. App’x 310, 312 (3d Cir. 2010) (calling penalty “a substantial amount but well below the statutory maximum”); *Qwest Corp. v. Minn. Pub. Utils. Comm’n*, 427 F.3d 1061, 1069 (8th Cir. 2005) (upholding total penalty in excess of \$25 million and observing that the daily fines were “well within the statutory limits”); *Pharaon*, 135 F.3d at 157 (upholding \$37 million fine against individual as proportional to his violations of Bank Holding Company Act and “well below the statutory maximum”).

²⁶⁶ See, e.g., *Korangy v. U.S. FDA*, 498 F.3d 272, 277–78 (4th Cir. 2007) (stating that penalty represented “a substantial reduction of the penalty authorized by Congress”); *United States v. Gurley*, 384 F.3d 316, 325 (6th Cir. 2004) (noting that “only a fraction” of the statutory maximum fine was ultimately levied); *Newell*, 231 F.3d at 210 (observing that fine against defendant was only about 10% of the statutory maximum fine and “therefore, does not violate the Eighth Amendment”); *Kelly*, 203 F.3d at 524 (“The inherently imprecise decision to fine [the defendants] a total of \$7,000 was not grossly disproportionate to the violation of an important environmental safeguard that could have drawn a total fine of \$100,000.”); *United States v. Emerson*, 107 F.3d 77, 80 (1st Cir. 1997) (noting that fine was one-half the size of that permitted by statute); cf. *Vasudeva v. United States*, 214 F.3d 1155, 1161 (9th Cir. 2000) (upholding civil monetary penalties against stores for trafficking in food stamps against Eighth Amendment challenge because the penalties were in lieu of permanent disqualification from the Food Stamp Program).

²⁶⁷ See, e.g., *United States v. Blackwell*, 459 F.3d 739, 771 (6th Cir. 2006) (“The fine in this case is not disproportionate to the gravity of the offense inasmuch as it is equal to the loss caused by the offense.”); *Qwest*, 427 F.3d at 1069 (upholding penalty exceeding \$25 million as “not excessive in light of the gravity of the harm caused by” the defendant’s violations of statutory filing requirements); *San Huan New Materials High Tech, Inc. v. Int’l Trade Comm’n*, 161 F.3d 1347, 1364 (Fed. Cir. 1998) (upholding \$1.55 million penalty as “represent[ing] a relatively low ratio of penalty to value of infringing goods”).

Several appellate courts have held that amounts imposed under criminal restitution orders—orders requiring defendants to compensate victims for the victims’ losses—do not violate the Excessive Fines Clause. See, e.g., *United States v. Newell*, 658 F.3d 1, 35 (1st Cir. 2011); *United States v. Lessner*, 498 F.3d 185, 205–06 (3d Cir. 2007); *United States v. Newsome*, 322 F.3d 328, 342 (4th Cir. 2003); *United States v. Dubose*, 146 F.3d 1141, 1145 (9th Cir. 1998). In upholding amounts imposed under criminal restitution orders against challenge under the Excessive Fines Clause, courts have cited the inherent proportionality of the restitution order to the harm inflicted. See, e.g., *Newell*, 658 F.3d at 35 (upholding \$1.6 million criminal restitution order and reasoning that “where the restitution order reflects the amount of the victim’s loss no constitutional violation has occurred”); *id.* (“[R]estitution is

financial gain to the defendant from the offense,²⁶⁸ the persistence or multiplicity of the defendant's violations,²⁶⁹ the need for deterrence,²⁷⁰ and the costs of investigating violations.²⁷¹ The appellate courts are divided as to whether the defendant's ability to pay is a factor under the Excessive Fines Clause.²⁷²

inherently proportional, insofar as the point of restitution is to restore the victim to the status *quo ante*. Restitution is distinct in this regard from forfeiture"); *Dubose*, 146 F.3d at 1145 ("Where the amount of restitution is geared directly to the amount of the victim's loss caused by the defendant's illegal activity, proportionality is already built [in]" (quoting *United States v. Dean*, 949 F. Supp. 782, 786 (D. Or. 1996) (internal quotation marks omitted))).

²⁶⁸ See, e.g., *Balice v. U.S. Dep't of Agric.*, 203 F.3d 684, 699 (9th Cir. 2000) (noting that fine was less than defendant's potential profit and concluding that fine was not grossly disproportionate to the offense); *United States v. Elkins*, 885 F.2d 775, 789 (11th Cir. 1989) (upholding \$6.6 million fine against criminal defendant and stating that "[a]lthough a large amount, we hold that a fine representing an amount less than the net profit of an illegal transaction does not violate the Eighth Amendment absent a showing of severe, particularized hardship suffered by defendant").

²⁶⁹ See, e.g., *Moustakis v. City of Fort Lauderdale*, 338 F. App'x 820, 822 (11th Cir. 2009) (rejecting argument that cumulation of daily fines over 14 years, totaling \$700,000, violated Excessive Fines Clause); *Korangy*, 498 F.3d at 277–78 (upholding civil penalties of \$3,000 for each of 193 violations concerning mammography equipment and stating: "While we recognize that this is a substantial penalty, the amount of the penalty is the direct result of the number of individual offenses committed by [defendants]. . . . [T]he gravity of their offenses does not diminish because they repeatedly committed the same offense."); *Gurley*, 384 F.3d at 325 (commenting on defendant's "wilful noncompliance for a period of seven years" in upholding civil penalties totaling approximately \$2 million); *Emerson*, 107 F.3d at 80 (commenting on the defendant's "repeated, highly culpable conduct" as supporting a significant penalty).

²⁷⁰ See, e.g., *Towers v. City of Chicago*, 173 F.3d 619, 626 (7th Cir. 1999) ("Five hundred dollars is not a trifling sum. But the City, in fixing the amount, was entitled to take into consideration that the ordinances must perform a deterrent function"); *Cole v. U.S. Dep't of Agric.*, 133 F.3d 803, 809 (11th Cir. 1998) ("The obvious purpose of the statutory scheme, and in particular the penalty at issue, is to discourage introducing over-quota tobacco into the market."); *Emerson*, 107 F.3d at 81 (approving district court's recognition "that a substantial penalty would be important as a deterrent to potential violators, since 'aviation safety rests in large part on voluntary compliance by those who, in all probability, will never face the regulatory scrutiny encountered by the defendants'").

²⁷¹ See, e.g., *United States v. Zakharia*, 418 F. App'x 414, 422 (6th Cir. 2011) (noting that the government had "spent considerable time and effort investigating" the defendant's misrepresentations); *Noriega-Perez v. United States*, 179 F.3d 1166, 1170 n.1 (9th Cir. 1999) ("[A] fine of \$96,000 . . . is hardly 'grossly disproportional' to the gravity of [the] offense, particularly considering [that the] cost of investigation was approximately \$48,000.").

²⁷² Compare *United States v. Lippert*, 148 F.3d 974, 978 (8th Cir. 1998) ("[I]n the case of fines, as opposed to forfeitures, the defendant's ability to pay is a factor under the Excessive Fines Clause."), with *Balice*, 203 F.3d at 690, 692 (concluding that statute did not require consideration of defendant's ability to pay penalty and then denying Excessive Fines Clause challenge to amount of penalty without mentioning ability to pay as a factor), and *United States v. 817 N.E. 29th Drive*, 175 F.3d 1304, 1311 & n.12 (11th Cir. 1999) (asserting that hardship to the defendant is not part of the Excessive Fines Clause inquiry).

Whatever the approach, the federal appellate courts have rejected all Excessive Fines Clause challenges to civil and criminal fines imposed within legislative boundaries, and they have upheld large, even multi-million dollar, penalties. Of particular interest, in comparison to the jury awards in *Thomas-Rasset* and *Tenenbaum*, is that appellate courts have upheld cumulative \$2 million and \$700,000 fines against individuals for statutory violations that neither led the defendants to profit appreciably nor caused direct economic harm to others.²⁷³

At the federal district court level, I found only four decisions directly holding that the Excessive Fines Clause would prohibit the imposition, within statutory boundaries, of the at-issue fines.²⁷⁴ The cases all involved aggregated

and that “excessiveness is determined in relation to the characteristics of the offense, not in relation to the characteristics of the offender”).

²⁷³ See, e.g., *Moustakis*, 338 F. App’x at 821–22 (upholding \$700,000 in total daily civil fines over fourteen years for homeowners’ failure to correct housing code violations); *Gurley*, 384 F.3d at 325 (upholding \$2 million in total daily civil penalties over period of seven years for defendant’s willful failure to respond to EPA information requests).

²⁷⁴ A computer query was constructed. LEXISNEXIS, <http://www.lexis.com> (select “U.S. District Courts, combined” database and search within for “Excessive Fines Clause”) (query last performed 7/17/2012). The four cases finding that the total aggregated amount of the minimum statutory penalties would violate the Excessive Fines Clause are: *United States ex rel. Kurt Bunk v. Birkart Globistics GmbH & Co.*, No. 1:02cv1168 (AJT/TRJ), 2012 WL 488256, at *3, *11 (E.D. Va. Feb. 14, 2012) (finding that aggregate civil penalties of over \$50 million—calculated at the minimum statutory penalty of \$5,500 for each of 9136 false claims—would be unconstitutional under the Excessive Fines Clause); *United States ex rel. Stearns v. Lane*, No. 2:08-cv-175, 2010 WL 3702538, at *4 (D. Vt. Sept. 15, 2010) (concluding that a potential cumulative penalty of \$66,000, for twelve false claims under a federal housing program that resulted in an illegal gain of \$828, was grossly disproportionate to the defendant’s offense and in violation of the Excessive Fines Clause); *United States v. Advance Tool Co.*, 902 F. Supp. 1011, 1018 (W.D. Mo. 1995) (finding that total penalty exceeding \$3 million for 686 false claims at statutory minimum of \$5,000 per claim would violate the Excessive Fines Clause, based in part on government’s inability to prove actual damages); *United States ex rel. Smith v. Gilbert Realty Co.*, 840 F. Supp. 71, 74–75 (E.D. Mich. 1993) (finding that total penalty of \$255,000 for landlord’s illegal endorsement of fifty-one rent checks at \$5,000 statutory minimum penalty per endorsement would violate the Excessive Fines Clause). Another decision is ambiguous as to whether the court simply exercised its discretion not to impose an additional remedy allowed under a federal statute or whether the court believed that the additional remedy would violate the Excessive Fines Clause on the facts of the case. *United States v. Kruse*, 101 F. Supp. 2d 410, 414 (E.D. Va. 2000) (noting Anti-Kickback statute mandates that the government recover double the amount of kickbacks and allows an additional recovery of up to \$10,000 per occurrence but stating that “imposition of a \$10,000 per occurrence penalty . . . would impose an impermissible punishment in this instance”). A few district court decisions after *Bajakajian* have not confronted Excessive Fines Challenges but nonetheless have commented that potential penalties might be constitutionally excessive. See, e.g., *Cohorst v. BRE Props., Inc.*, No. 3:10-CV-2666-JM-BGS, 2011 WL 7061923, at *14 (S.D. Cal. Nov. 19, 2011) (regarding fairness of proposed class action settlement, special master speculating that a potential award of state statutory damages in class action above the proposed settlement amount “could present significant constitutional issues” but wrongly referring to Excessive

mandatory minimum civil penalties for violations of the civil False Claims Act. The Act requires a minimum penalty—currently \$5,500—for each knowingly false claim submitted to the United States.²⁷⁵ I will address constitutional excessiveness issues pertaining to the aggregation of statutory monetary remedies or penalties in more detail in section D.

The doctrine developed under the Excessive Fines Clause and the rarity of excessiveness findings with respect to traditional monetary fines suggest two conclusions. First, close judicial scrutiny of a penalty imposed in a particular case is warranted when Congress authorized a severe penalty for many types of offenses, with the offenses varying substantially in terms of seriousness. The main problem in *Bajakajian* was that because Congress had required total forfeiture of assets for a broad range of criminal offenses, the penalty was disproportionate to the defendant's particular offense.²⁷⁶ Second, the principal reason that federal courts rarely have found traditional monetary fines excessive under due process is a presumption that Congress created penalty ranges that are proportional to the statutory offenses.²⁷⁷

Williams, under due process, and *Bajakajian*, under the Excessive Fines Clause, share essentially the same standard of review for excessiveness—gross disproportionality of the remedy or fine to the defendant's offense. Both standards consider harm to the public from the defendant's conduct. The legislature creates the remedies and penalties, including the monetary

Fines Clause given that no payment would be made to the government in the case); *In re Zyprexa Prods. Liab. Litig.*, 671 F. Supp. 2d 397, 462–63 (E.D.N.Y. 2009) (in refusing to allow state to rely on aggregate evidence, stating that “Mississippi’s requests for [state] statutory penalties on a per-violation basis, in addition to actual damages sought, would result in a multibillion dollar cumulative penalty grossly disproportionate to both the injury Mississippi has suffered and the seriousness of [defendant]’s alleged misconduct” and that “[t]he scale of the potential recovery sought by Mississippi may implicate the constitutional limitations on excessive fines and punitive damages”). Moreover, the federal government has sometimes sought less than the statutory minimum penalties under the False Claims Act, conceding that the total penalties would violate the Excessive Fines Clause. *See, e.g.*, *United States v. Bickel*, No. 02-3144, 2006 WL 1120439, at *3 (C.D. Ill. Feb. 22, 2006) (noting that United States conceded that where defendant had submitted 32,949 false claims, minimum statutory penalty of \$5,000 for each false claim would total \$181,219,500 and thus be excessive under the Excessive Fines Clause and concluding that \$11,000 civil penalty instead sought by United States plus treble damages did not violate the Excessive Fines Clause).

²⁷⁵ 31 U.S.C. §§ 3729(a)(1)–(3), (7) (2006).

²⁷⁶ After *Bajakajian*, Congress amended the forfeiture statute to drop the currency reporting offense and a few other offenses from the list of criminal offenses triggering total forfeiture. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), Pub. L. No. 107-56, § 371, 115 Stat. 272, 336 (codified at 31 U.S.C. § 5332 (2006)).

²⁷⁷ *Cf. King, supra* note 235, at 153 (“If one looks at the typical penalty in isolation, precluding constitutional review does not appear to be that unreasonable, especially because a legislature and at least one representative of another branch (prosecutors, judges, sentencing commissions, etc.) have already approved of its severity.”).

boundaries of both. Due to the unique concerns about abuse of government power motivating the inclusion of the Excessive Fines Clause in the Constitution, the level of judicial review under the Excessive Fines Clause should constitute a ceiling for the level of scrutiny under due process that courts should give awards of legislatively created remedies. Moreover, legislatively created remedies awarded in a given case may or may not have a punitive element; they should thus not be reviewed more strictly than punitive fines.

Courts reviewing legislatively created remedies for excessiveness under due process should be as deferential to the legislature's and trial decisionmaker's choice of amounts as courts have been in reviewing the amount of traditional fines under the Excessive Fines Clause. Returning to the per-song awards of \$9,250, \$80,000, and \$62,500, respectively, in the three *Thomas-Rasset* trials, and the per song award of \$22,500 in *Tenenbaum*, I suggest that none of these amounts are wholly disproportioned to the offenses committed by the defendants. Several of the factors that federal courts have cited in upholding legislatively created remedies and penalties against constitutional excessiveness challenges are present with respect to the jury awards in *Thomas-Rasset* and *Tenenbaum*. The awards were well within the relevant statutory range; there was actual and potential harm, both to the plaintiffs and to the public generally, from the defendant's illegal conduct; the defendants were within the class of persons for whom the Copyright Act was designed;²⁷⁸ the plaintiffs incurred costs in investigating violations of the Act; the defendants potentially could have gained financially from their illegal conduct; and the defendants committed multiple violations of the statute, indicating a higher degree of culpability than a single violator.

C. The Inapt Analogy to Due Process Review of Punitive Damages

Some courts and commentators have suggested that Supreme Court doctrine developed to review uncapped punitive damages awards for excessiveness under due process should apply also to awards of congressionally created monetary remedies, specifically "statutory damages."²⁷⁹ This line of doctrine should not apply to legislatively created remedies, because such remedies are

²⁷⁸ See *Capitol Records, Inc. v. Thomas-Rasset*, Nos. 11-2820, 11-2858, 2012 WL 3930988, at *8 (8th Cir. Sept. 11, 2012) (stating that "the statute plainly encompasses infringers who act without a profit motive" and that the legislative history of the Copyright Act indicates that Congress intended the statute to apply to noncommercial infringers). One might make the contrary argument that not-for-profit infringers do "not fit into the class of persons for whom the statute was principally designed." *Bajakajian*, 524 U.S. at 338. The context for this language from *Bajakajian*, however, was a significant mismatch between total asset forfeiture and the defendant's failure to report that he was taking more than \$10,000 in currency out of the country. *Id.* at 337-40. The Copyright Act is much narrower in terms of liability and remedy than the criminal forfeiture statute involved in *Bajakajian*. See *supra* notes 22-23 and accompanying text.

²⁷⁹ See cases cited *infra* note 311 and commentators cited *supra* note 18.

limited by Congress and serve a variety of purposes beyond punishment and deterrence. Even if the Supreme Court's punitive damages doctrine were to apply to legislatively created remedies, courts should apply it with a very light hand, following the lead of lower federal courts that have reviewed punitive damages awards subject to legislative caps.

1. *Whether Gore/Campbell Applies to Legislatively Created Remedies*

The Supreme Court has held that due process places "substantive limits" on the amount of punitive damages awards,²⁸⁰ and that due process is offended by a "grossly excessive" amount of punitive damages.²⁸¹ It has also commented that persons should "receive fair notice . . . of the severity of the penalty that a State may impose."²⁸²

Two principal cases developed standards for evaluating whether a punitive damages award offends due process: *BMW of North America, Inc. v. Gore*²⁸³ and *State Farm Mutual Auto Insurance Company v. Campbell*.²⁸⁴ These cases developed three "guideposts" for reviewing whether a jury's punitive damages award is grossly excessive: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio between the harm or potential harm suffered by the plaintiff and the amount of the punitive damages award, and (3) the difference between the amount of the award and the amount of penalties authorized or imposed in comparable cases.²⁸⁵ The Supreme Court has cited *Bajakajian* and some of the Court's criminal sentencing decisions as precedents for the three guideposts.²⁸⁶

²⁸⁰ *E.g.*, *State Farm Mutual Auto Ins. v. Campbell*, 538 U.S. 408, 416–17 (2003) ("[T]here are procedural and substantive constitutional limitations on [punitive damages] awards."); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433–34 (2001) (stating that the Due Process Clause imposes "substantive limits" on punitive damages awards in prohibiting government from "imposing 'grossly excessive' punishments on tortfeasors").

²⁸¹ *See, e.g.*, *Campbell*, 538 U.S. at 416 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments" (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996))); *Gore*, 517 U.S. at 562 (stating that due process prohibits a "grossly excessive punishment on a tortfeasor") (internal quotation marks omitted).

²⁸² *Gore*, 517 U.S. at 574.

²⁸³ 517 U.S. 559 (1996).

²⁸⁴ 538 U.S. 408 (2003).

²⁸⁵ *Id.* at 418 (citing *Gore*, 517 U.S. at 575); *Gore*, 517 U.S. at 574–83. The Court has asserted that the reprehensibility of the defendant's conduct is the most important to the excessiveness inquiry. *See Campbell*, 538 U.S. at 419; *Gore*, 517 U.S. at 575. *Campbell* articulated factors relevant to determining the reprehensibility of a defendant's tortious conduct, including: whether the harm caused was physical as opposed to economic; whether the defendant's conduct evinced an indifference to or reckless disregard of the health or safety of others; whether the conduct involved repeated actions or was an isolated incident; and whether the conduct was intentional. *Campbell*, 538 U.S. at 419.

²⁸⁶ *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001).

Despite the similarities in assessing gross excessiveness, important differences exist between the doctrine of *Gore/Campbell* and that of *Williams* and *Bajakajian*. First, the harm to be considered in due process review of the amount of punitive damages is only the harm to the plaintiff.²⁸⁷ By contrast, in due process review of the amount of a legislatively created remedy, *Williams* asserted that the harm to the public from the statutory violation was relevant, beyond any possible harm to the plaintiff.²⁸⁸ Similarly, in reviewing whether a legislatively created penalty violated the Excessive Fines Clause, *Bajakajian* considered harm to both the government and the public from the defendant's offense.²⁸⁹ As a logical matter, it would seem that an excessiveness inquiry that considers harm to the public in addition to any harm to the plaintiff is more lenient than an excessiveness inquiry that considers only harm to the plaintiff.

A second important difference between the doctrine of *Gore/Campbell* and that of *Williams* and *Bajakajian* is the manner by which to measure any disproportionality between an award or fine and the offense. With respect to the guidepost that compares the amount of a punitive damages award to actual or potential harm, *Campbell* suggested that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."²⁹⁰ *Williams* and *Bajakajian* do not posit such a mathematical approach. This is understandable, given that legislatively created remedies and fines do not presuppose an award of compensatory damages or even plaintiff harm.²⁹¹ Recall that Judge Gertner in *Tenenbaum* suggested that the difference in the approaches of *Williams* and *Gore/Campbell* "are, in practice, minimal."²⁹² The "single-digit" ratio language of *Campbell*, however, is in stark contrast to the implicit assumption in *Williams* that the difference

²⁸⁷ See *Philip Morris USA v. Williams*, 549 U.S. 346, 349 (2007) (stating that due process does not allow a jury to base its punitive damages "award in part upon its desire to punish the defendant for harming persons who are not before the court").

²⁸⁸ See *supra* note 211 and accompanying text.

²⁸⁹ See *supra* notes 246, 253–55 and accompanying text.

²⁹⁰ 538 U.S. at 425. It added that greater ratios might be warranted if a particularly reprehensible act results in a small amount of economic damages, the harm might be hard to detect, or the monetary value of noneconomic harm might be difficult to determine. *Id.* (citing *Gore*, 517 U.S. at 582).

²⁹¹ See *supra* Part II.B.1. Lower courts applying *Williams* have determined that the statutory maximum of a legislatively created remedy may be imposed even if the plaintiff has not suffered any loss; they also have asserted that a legislatively created remedy need not be proportional to the plaintiff's losses. See Sheila B. Scheuerman, *The Road Not Taken: Would Application of the Excessive Fines Clause to Punitive Damages Have Made a Difference?*, 17 WIDENER L. REV. 949, 966–67 (2008) (noting the different approaches of *Bajakajian* and *Gore* to comparing the amount of the penalty with the harm caused and stating that "[b]y definition, damages cases provide an objective calculation of 'harm' through the plaintiff's compensatory damages award. This concrete measure is lacking in criminal cases").

²⁹² *Tenenbaum I*, 721 F. Supp. 2d 85, 101 (D. Mass. 2010).

between a \$300 legislatively created remedy and plaintiff economic loss of only a cent would not violate due process.²⁹³

In addition to the differences in doctrinal formulation, the standards in *Williams* and *Bajakajian* have produced dramatically different results in the lower courts than the guideposts of *Gore/Campbell*. Review of uncapped punitive damages under *Gore/Campbell* frequently has resulted in findings of unconstitutional excessiveness.²⁹⁴ A limited computerized search for lower federal court decisions since June 22, 1998 (the date of the *Bajakajian* decision)²⁹⁵ found eleven appellate court decisions²⁹⁶ and nine district court decisions concluding that an award of punitive damages was excessive under due process.²⁹⁷ (Other federal courts have deemed awards of punitive damages excessive on nonconstitutional grounds.)²⁹⁸ By contrast, before the district

²⁹³ See *supra* notes 216–17 and accompanying text.

²⁹⁴ The Supreme Court itself found the punitive damages awards in *Gore* and *Campbell* to be unconstitutionally excessive. *Campbell*, 538 U.S. at 429 (reversing punitive damages award of \$145 million for insurance company's bad faith refusal to settle); *Gore*, 517 U.S. at 585–86 (reversing punitive damages award of \$2 million for fraudulent conduct).

²⁹⁵ A search was constructed. LEXISNEXIS, <http://www.lexis.com> (select “U.S. District Courts” & “U.S. Courts of Appeals,” Segment—Overview, dates 6/22/1998–7/3/2012, and search within for “punitive damage w/10 excessive”) (query last performed July 16, 2012). The results were reviewed to identify cases that deemed awards of punitive damages to be excessive under due process.

²⁹⁶ *Jones v. UPS*, 674 F.3d 1187, 1192 (10th Cir. 2012); *Thomas v. IStar Fin. Inc.*, 652 F.3d 141, 144 (2d Cir. 2011); *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362 (8th Cir. 2009); *Bennett v. Am. Med. Response, Inc.*, 226 F. App'x 725, 728–29 (9th Cir. 2007); *Clark v. Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006); *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 356 (6th Cir. 2005); *Bains v. Arco Prods.*, 405 F.3d 764, 777 (9th Cir. 2005); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005); *Fabri v. United Tech. Int'l*, 387 F.3d 109, 127 (2d Cir. 2004); *Disorbo v. Hoy*, 343 F.3d 172, 189 (2d Cir. 2003); *Inter Med. Supplies, Ltd. v. EBI Med. Sys.*, 181 F.3d 446, 467–68 (3d Cir. 1999). With the exception of *Bennett*, all the cases involved awards by a jury.

²⁹⁷ *Quigley v. Winter*, 584 F. Supp. 2d 1153, 1162 (N.D. Iowa 2008); *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 972–73 (N.D. Iowa 2003); *Ceimo v. General Am. Life Ins. Co.*, No. 2:00-CV-1386 FJM, 2003 WL 35481095, at *2 (D. Ariz. Sept. 17, 2003); *Stack v. Jaffee*, 306 F. Supp. 2d 137, 142 (D. Conn. 2003); *EEOC v. Mid-Continent Sec. Agency, Inc.*, No. 99 C 5381, 2001 WL 800089, at *5 (N.D. Ill. July 12, 2001); *Murray v. Solidarity of Labor Org.*, 172 F. Supp. 2d 1134, 1155 (N.D. Iowa 2001); *Ortiz-Valle v. NBA*, 42 F. Supp. 2d 334, 345 (S.D.N.Y. 1999); *Ace v. Aetna Life Ins. Co.*, 40 F. Supp. 2d 1125, 1135–36 (D. Alaska 1999); *King v. Verdone*, No. 97 CV 1487, 1999 WL 33432177, at *5 (D. Conn. Sept. 30, 1999). With the exception of *Murray*, all the cases involved awards by a jury.

²⁹⁸ See, e.g., *Cretella v. Kuzminski*, 640 F. Supp. 2d 741, 262–72 (E.D. Va. 2009); *Poliner v. Tex. Health Sys.*, 239 F.R.D. 468, 477–78 (N.D. Tex. 2006); *David v. Caterpillar, Inc.*, 185 F. Supp. 2d 918, 926 (C.D. Ill. 2002); *Int'l Minerals & Res. S.A. v. Am. Gen. Res., Inc.*, No. 87 Civ 3988 (HB), 2000 WL 97613, at *3 (S.D.N.Y. Jan. 27, 2000); *Williams v. Patel*, 104 F. Supp. 2d 984, 999–1000 (C.D. Ill. 2000). Courts may consider a punitive damages award excessive under nonconstitutional standards even though the amount of the award would not violate due process. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (limiting punitive damage awards in maritime cases to an amount equal to the

court's constitutional review decision in *Thomas-Rasset*, federal court review of legislatively created remedies under *Williams* had not resulted in any excessiveness findings.²⁹⁹ Federal court determinations since *Bajakajian* that statutory fines were unconstitutional under the Excessive Fines Clause have been extremely rare.³⁰⁰

Litigants confronting awards of “statutory damages” have at times argued that the awards should be reviewed for unconstitutional excessiveness under *Gore* and *Campbell*.³⁰¹ The context usually is that of a defendant who faces a high aggregate award for multiple violations of a statutory provision, with each violation subject to statutory damages.³⁰² Commentators, too, have asserted that statutory damages should be subject to review under *Gore/Campbell*.³⁰³

Some federal courts, including the Eighth Circuit and the district court in *Thomas-Rasset*, have explicitly rejected using *Gore/Campbell* to review whether an award of legislatively created remedies violates due process.³⁰⁴

amount of compensatory damages as a matter of federal maritime common law rather than due process); RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW §14.6(e) (5th ed. 2012) (“[C]ourts are free to interpret the common law of their jurisdiction in a way that limits the award of punitive damages below the limit that would be set by due process.”).

²⁹⁹ See *supra* notes 219–24 and accompanying text.

³⁰⁰ See *supra* notes 260–74 and accompanying text.

³⁰¹ See, e.g., *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825, 835 (D. Md. 2011) (“Protus makes the case that even if \$500–\$1,500 in statutory damages [for violation of the federal Telephone Consumer Protection Act] are constitutional, an aggregate award, taking account of hundreds of unsolicited faxes, could easily reach into the millions, and could therefore violate due process.”); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 973 (C.D. Cal. 2007) (“Adidas does not contend a \$1,000 fine would be grossly excessive. Rather, it raises the specter of the tens of thousands of \$1,000 fines that could be imposed if the putative class is certified and eventually recovers the statutory maximum.”).

³⁰² *Pasco*, 826 F. Supp. 2d at 835; *Arcilla*, 488 F. Supp. 2d at 973.

³⁰³ See *supra* note 18.

³⁰⁴ See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, Nos. 11-2820, 11-2858, 2012 WL 3930988, at *7 (8th Cir. Sept. 11, 2012); *Zomba Enters. v. Panorama Records*, 491 F.3d 574, 586–88 (6th Cir. 2007), *cert. denied*, 553 U.S. 1032 (2008) (refusing to apply *Gore* and *Campbell* to copyright statutory damages and stating that the *Williams* standard controls instead); *Thomas-Rasset III*, 799 F. Supp. 2d 999, 1004–06 (D. Minn. 2011); *Verizon Cal. Inc. v. OnlineNIC, Inc.*, No. C 08-2832 JF (RS), 2009 WL 2706393, at *6–7, *8 (N.D. Cal. Aug. 25, 2009) (upholding \$50,000 in statutory damages per violation of the federal Anticybersquatting Consumer Protection Act for a total of \$33.15 million under the *Williams* standard and discussing why *Gore* and *Campbell* should not apply to statutory damages except perhaps for the rule from *Campbell* that “a court authorizing an award that reaches well into [sic] realm of punitive or deterrence-oriented damages must be careful not to punish the defendant for wrongful acts other than to those committed against the plaintiff”); *Arrez v. Kelly Servs.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (stating that *Gore* and *Campbell* “are not relevant to statutory penalties” and upholding, under the *Williams* standard, a state statute authorizing “up to \$500 penalty”); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459–60 (D. Md. 2004) (concluding that *Gore* guideposts

These courts have variously reasoned that *Gore/Campbell* is inapplicable because it addressed open-ended punitive damages, not bounded legislatively created remedies;³⁰⁵ that examining the disparity between punitive damages and plaintiff harm (the second *Gore* guidepost) does not translate well to statutory damages, which often are available in the absence, or proof, of plaintiff harm;³⁰⁶ and that the Court's due process concern about "fair notice" of potential penalties is absent when a statutory range for the remedy exists—the statute gives citizens notice of the maximum remedy to which they are exposed.³⁰⁷

To elaborate on the distinction drawn by these lower courts between punitive damages awards and legislatively created remedies imposed within statutory boundaries, it is important to note that the Supreme Court's punitive damages doctrine has focused on the risks of arbitrariness and uncertainty attending awards of punitive damages;³⁰⁸ the Court has sought to guard against "punishments that reflect not an 'application of law,' but a 'decisionmaker's caprice.'"³⁰⁹ The Court's cases all involved punitive damages awarded by juries, who are one-time actors in the legal system, while awards of legislatively created remedies fall within ranges created by Congress—a repeat actor in the legal system who created both the statutory cause of action and the legislatively created remedy. Congress enacts legislatively created remedies for relatively discrete areas of substantive law and chooses the statutory minimum and

do not apply to copyright statutory damages); *cf.* *Arista Records L.L.C. v. Usenet.com*, No. 07 Civ. 8822(HB), 2010 WL 3629587, at *5 (S.D.N.Y. Sept. 16, 2010) (declining to decide whether *Gore* and *Campbell* apply to copyright statutory damages because amount of possible actual damages was greater than amount of statutory damages awarded).

³⁰⁵ *Thomas-Rasset*, 2012 WL 3930988, at *7 (emphasizing that copyright statutory damages are "constrained by the authorizing statute"); *Zomba*, 491 F.3d at 586 (noting that both *Gore* and *Campbell* addressed due process challenges to "punitive-damages awards" and concluding that *Williams* controls until the Supreme Court applies *Campbell* to an award of statutory damages); *Arrez*, 522 F. Supp. 2d at 1008 (citing cases distinguishing punitive damages from statutory penalties); *Lowry's Reports*, 302 F. Supp. 2d at 460 ("The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress'[s] carefully crafted and reasonably constrained [copyright infringement] statute.").

³⁰⁶ *See, e.g., Thomas-Rasset*, 2012 WL 3930988, at *7 ("It makes no sense to consider the disparity between 'actual harm' and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate."); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C 07-03952 JW, 2010 WL 5598337, at *14 n.25 (N.D. Cal. Mar. 19, 2010); *Verizon*, 2009 WL 2706393, at *8.

³⁰⁷ *See, e.g., Thomas-Rasset*, 2012 WL 3930988, at *7 (stating that the "concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute"); *Verizon*, 2009 WL 2706393, at *8.

³⁰⁸ *See, e.g., Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007) (summarizing "the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty, and lack of notice").

³⁰⁹ *Id.* at 352 (citing *Campbell*, 538 U.S. at 418).

maximum accordingly. The trial decisionmaker has no discretion to make an award in excess of the statutory limits. Thus, an individual award within the statutory range is more appropriately viewed to be “an application of law” rather than a “decisionmaker’s caprice.”³¹⁰ Moreover, the Supreme Court developed the *Gore/Campbell* doctrine to address unambiguously punitive remedies; a legislatively created remedy may or may not have a punitive element.

Thus far, Judge Gertner in *Tenenbaum* apparently is the only federal judge to have applied *Gore/Campbell* to an actual award of legislatively created remedies, and she did so in the context of multiple awards of statutory damages. A few other courts have speculated, without deciding, that *Gore/Campbell* may apply to legislatively created remedies; the contexts likewise involved the possibility of multiple awards.³¹¹ Section D addresses separately whether aggregated awards of legislatively created remedies pose unique constitutional issues.

Assuming, for the sake of argument, that *Gore/Campbell* should apply to legislatively created remedies, it is illuminating to consider how federal courts have applied the doctrine to awards of punitive damages that were subject to legislative caps. No commentator advocating the applicability of *Gore/Campbell* to legislatively created remedies has pursued this line of inquiry. As the next section shows, courts have weighed the existence of a statutory cap favorably in their due process analysis.

2. Punitive Damages Subject to Legislative Caps

Congress only rarely has imposed a cap on judicially created remedies.³¹² The most frequently litigated example arises under the Civil Rights Act of 1991,

³¹⁰ *Cf.* *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 455–56 (1993) (responding to defendant’s suggestion that “punitive damages awards should be scrutinized more strictly than legislative penalties” under due process by stating “[t]he review of a jury’s award for arbitrariness and the review of legislation surely are significantly different[.]”).

³¹¹ *See, e.g.,* *DirectTV, Inc. v. Gonzales*, No. Civ. A.SA–03–1170 SR., 2004 WL 1875046, at *4 (W.D. Tex. Aug. 23, 2004) (ruling on defendant’s motion to dismiss and stating as “hypothetical” the concern that “it may be that a statutory damages provision that grossly exceeds any actual damages would violate due process” under *Campbell*); *cf.* *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095 (DGT), 2006 WL 335048, at *5 (E.D.N.Y. Nov. 9, 2006) (allowing as nonfrivolous an amendment asserting affirmative defense that copyright statutory damages minimum of \$750 would be unconstitutionally excessive compared to actual damages of 70 cents per recording).

³¹² Thus far, no federal statute has capped compensatory or punitive damages in pre-existing common law actions, although bills have been introduced in Congress that would cap plaintiffs’ recovery of damages in actions for medical malpractice and products liability. *See, e.g.,* Protecting Access to Healthcare Act, H.R. 5, 112th Cong. (2012) (as passed by House, Mar. 22, 2012); Meaningful End to Defensive Medicine & Aimless Lawsuits (MedMal) Act of 2010, H.R. 5690, 111th Cong. (2010); Fair Resolution of Medical Liability Disputes Act of 2009, S. 2662, 111th Cong. (2009); Innocent Sellers Fairness Act,

which has a sliding scale of caps on the total amount of compensatory and punitive damages recoverable for employment discrimination claims arising under federal law.³¹³ The Act expressly exempts back pay and past pecuniary losses from the caps.³¹⁴ The caps are gauged to the number of employees working for the employer, with a \$300,000 upper limit.³¹⁵

Many federal courts addressing whether a punitive damages award subject to one of these caps was unconstitutionally excessive have assumed that *Gore/Campbell* governs.³¹⁶ If the initial punitive damages award was above the statutory cap, courts usually have treated the award as reduced to the statutory maximum and then applied the *Gore* guideposts.³¹⁷ Several courts have asserted that the existence of the statutory cap is a strong factor in favor of finding that the award does not violate due process. Some have reasoned that the existence

H.R. 2518, 111th Cong. (2009). With respect to causes of action created by Congress in which a constitutional right to jury trial exists, very few federal statutes cap judicial remedies. *See, e.g.*, Oil Pollution Act of 1990, 33 U.S.C. §§ 2701–2761; Civil Rights Act of 1991, 42 U.S.C. § 1981a(b)(3) (discussed in *infra* notes 313–15 and accompanying text). *See generally* Colleen P. Murphy, *Determining Compensation: The Tension Between Legislative Power and Jury Authority*, 74 TEX. L. REV. 345, 373–77 (1995) (discussing federal statutes that limit compensatory damages, including for causes of action in which no entitlement to jury trial exists).

³¹³ 42 U.S.C. §§ 1981a(b)(3)(A)–(D) (2006). Most of the legislative debate on capping damages in the Civil Rights Act of 1991 focused on punitive damages; many legislators feared that juries would assess large punitive damages, crippling small businesses. Murphy, *supra* note 312, at 375; *see also* 137 CONG. REC. S15472 (daily ed. Oct. 30, 1991) (statement of Sen. Dole) (claiming that the caps set “an important precedent for tort reform”); 136 CONG. REC. S9909 (daily ed. July 18, 1990) (statement of Sen. Bumpers) (warning that the threat of punitive damages would be “a Damocles sword” over the heads of small businesses). The legislative history does not reveal why Congress decided to limit compensatory awards also.

³¹⁴ 42 U.S.C. § 1981a(b)(2) (2006).

³¹⁵ *Id.* § 1981a(b)(3)(D).

³¹⁶ *See, e.g.*, EEOC v. W&O, Inc., 213 F.3d 600, 614 (11th Cir. 2000); Allen v. Radio One of Tex. II, L.L.C., No. H-09-4088, 2011 WL 5156688 at *4 (S.D. Tex. Oct. 28, 2011) (applying reprehensibility guidepost under *Gore* to a punitive damages award reduced to the Title VII cap and upholding award); Myers v. Cent. Fla. Inv., Inc., No. 6:04-cv-1542-Orl-28DAB, 2008 WL 4710898, at *16 (M.D. Fla. Oct. 23, 2008) (applying *Gore* guideposts to a punitive award reduced to a state cap and upholding award); Lopez v. Aramark Unif. & Career Apparel, Inc., 426 F. Supp. 2d 914, 968–72 (N.D. Iowa 2006) (applying *Gore* guideposts to a punitive damages award that was less than Title VII statutory cap and upholding award); Millazzo v. Universal Traffic Serv., Inc., 289 F. Supp. 2d 1251, 1255–58 (D. Colo. 2003) (applying *Gore* guideposts to punitive award reduced to Title VII cap and upholding award).

³¹⁷ *But see* Arizona v. ASARCO, L.L.C., 798 F. Supp. 2d 1023, 1046 (D. Ariz. 2011) (stating in a case where a Title VII cap applied: “[R]ather than applying an unconstitutional excessiveness analysis to a ‘capped’ punitive damages award, I believe that the proper approach is to consider the *jury’s* punitive damages award in light of the factors pertinent to an unconstitutional excessiveness analysis. Then, if due process would otherwise permit a larger award, I must reduce the punitive damages award to the amount that, combined with any compensatory damages, conforms to the applicable statutory cap.”).

of the statutory cap satisfies the underlying *Gore/Campbell* concern that a person have fair notice of the severity of the penalty to which the person may be subjected.³¹⁸ Others have assumed that the existence of a statutory cap satisfies the third *Gore/Campbell* guidepost comparing a punitive damages award to penalties authorized or imposed in other cases—the cap is the “comparator” for purposes of the third guidepost.³¹⁹

Although many federal courts assume that *Gore/Campbell* applies, at least two federal courts of appeals have intimated that the employment discrimination caps largely obviate the need for *Gore/Campbell* review because of the deference due to Congress’s choice of the cap amounts.³²⁰ The First Circuit asserted that “a punitive damages award that comports with a statutory cap provides strong evidence that a defendant’s due process rights have not

³¹⁸ See, e.g., *EEOC v. Fed. Express Corp.*, 513 F.3d 360, 378 (4th Cir. 2008). The Fourth Circuit, after applying the *Gore* guideposts, stated that the fact that the punitive damages award, combined with the compensatory damages award, was substantially less than the applicable Title VII cap “provides additional support for the reasonableness and constitutionality of the punitive damages award.” *Id.* The court further reasoned that the statutory cap gave the defendant “fair notice of the range of available civil penalties” for discriminatory conduct. *Id.*

³¹⁹ See, e.g., *Romano v. U-Haul Int’l*, 233 F.3d 655, 674 (1st Cir. 2000) (addressing third guidepost and stating that “through the statutory scheme of Title VII and the punitive damages cap figures set out . . . [a defendant] has full notice of the potential liability to which it was subject”); *W&O*, 213 F.3d at 617 (stating that statute put defendant “on notice that it could be liable for punitive damages up to the statutory cap” in discussing the third guidepost and upholding punitive damages award); *ASARCO*, 798 F. Supp. 2d at 1044 (“[I]t is appropriate to use Title VII’s statutory cap as a yardstick of constitutional excessiveness, because the Title VII cap ‘represent[s] a legislative judgment similar to the imposition of a civil fine’” (citing *Zhang v. Am. Gem Seafoods*, 339 F.3d 1020, 1045 (9th Cir. 2003))).

³²⁰ See, e.g., *Abner v. Kansas City S. R.R. Co.*, 513 F.3d 154, 164 (5th Cir. 2008) (“[T]he combination of the statutory cap and high threshold of culpability for any award confines the amount of the award to a level tolerated by due process. Given that Congress has effectively set the tolerable proportion, the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process.”); *Romano*, 233 F.3d at 673 (stating that “a congressionally-mandated, statutory scheme identifying the prohibited conduct as well as the potential range of financial penalties goes far in assuring that [defendants’] due process rights have not been violated” and then adding that “even subjecting the \$285,000 award to the *Gore* three-guidepost analysis, we find that the amount is constitutionally permissible”). The First Circuit in *Romano* justified its assertion that “a punitive damages award that comports with a statutory cap provides strong evidence that a defendant’s due process rights have not been violated” based on language in *Gore* that “a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions.” 233 F.3d at 673 (internal quotation marks omitted); see also *ASARCO*, 798 F. Supp. 2d 1023 at 1044 (interpreting decision of the Court of Appeals for the Ninth Circuit as suggesting that “in a Title VII discrimination case, a punitive damages award at the statutory cap . . . would comport with due process, if it is otherwise supported by evidence that punitive damages were warranted”). *But cf.* *Johnson v. Hugo’s Skateway*, 974 F.2d 1408, 1415 n.6 (4th Cir. 1992) (“We cannot say . . . that the mere existence of the cap will . . . insulate from attack an otherwise arbitrary award of punitive damages.”).

been violated.”³²¹ It based this assertion on language in *Gore* that “a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions.”³²² The Fifth Circuit has gone even further in insulating a punitive damages award at or below a statutory cap from analysis under *Gore/Campbell*:

[T]he combination of the statutory cap and high threshold of culpability for any award confines the amount of the award to a level tolerated by due process. Given that Congress has effectively set the tolerable proportion, the three-factor *Gore* analysis is relevant only if the statutory cap itself offends due process.³²³

Whether the federal courts straightforwardly applied the *Gore* guideposts, considered the existence of the statutory cap as an important factor in applying the *Gore* guideposts, or took the bolder position that the statutory cap for the most part supplants *Gore/Campbell* review, the result has been the same: courts have been reluctant to find that a punitive damages award at or below a federal statutory cap violated due process.³²⁴ Instead, federal courts have upheld

³²¹ *Romano*, 233 F.3d at 673.

³²² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996) (internal quotation marks omitted).

³²³ *Abner*, 513 F.3d at 164. The *Abner* court conclusorily asserted that the Title VII cap did not offend due process. *Id.* Earlier decisions of the Fifth Circuit, however, declared punitive damages awards under Title VII to be excessive under nonconstitutional review, informed by the *Gore* guideposts. *See* *Rubinstein v. Adm’rs of Tulane Educ. Fund*, 218 F.3d 392, 407 (5th Cir. 2000) (stating that “a more fully developed approach to assessing the Constitutionality of a punitive damages award awaits a future day”); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 595 (5th Cir. 1998) (characterizing *Gore* as “‘instructive’” in evaluating defendant’s non-constitutional excessiveness challenge and stating that it “will not develop in detail the three [guideposts] as will be necessary for a constitutional challenge”).

³²⁴ I constructed a query for federal court cases discussing whether a punitive award at or below a statutory cap violated due process. LEXISNEXIS, <http://www.lexis.com> (select “Federal Court Cases” and search within for “(statutory pre/1 cap) w/50 due process”) (query last performed Jan. 24, 2012). I found only one case in which a federal court seemed to hold that a punitive damages award under a statutory cap violated due process under the *Gore* guideposts. *See* *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164, 178 (E.D. Pa. 1996) (applying *Gore* guideposts in concluding punitive damages award under Americans with Disability Act cap was excessive and using the nonconstitutional review language that the jury’s award “shock[ed] the court’s conscience”); *cf.* *Austin v. Norfolk S. Corp.*, 158 F. App’x 374, 390 (3d Cir. 2005) (Nygaard, J., dissenting) (arguing, contrary to majority opinion, that plaintiff prevailed on her retaliation claim under Title VII, and then asserting that the \$175,000 punitive award at the trial level, subject to a \$300,000 cap, violated due process under the *Gore* guideposts); *ASARCO*, 798 F. Supp. 2d at 1046 (“[D]ue process might well limit a punitive damages award to an amount *well below* an applicable statutory cap. For example, if a plaintiff suffered \$2,500 in compensatory damages from a single incident, involving conduct that was more accidental than malicious, due process might well limit that plaintiff’s

substantial punitive damages awards subject to a statutory cap, even when the plaintiff's actual or potential harm was nominal or comparatively low.³²⁵ Courts upholding high punitive to compensatory ratios have relied in part on Supreme Court language in *Gore*:

[L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.³²⁶

The need for adequate deterrence of the defendant can support a high ratio.³²⁷

Added to this reasoning, some federal courts, in minimizing the importance of the ratio of punitive to compensatory damages, have cited the existence of the statutory cap. The Fifth Circuit, after finding that the employment discrimination caps did not offend due process, added that “we have found in

punitive damages award to \$22,500, a single-digit multiplier, . . . and a total amount for compensatory damages below the statutory cap”); *Thomas v. IStar Fin., Inc.*, 508 F. Supp. 2d 252, 263–64 (S.D.N.Y. 2007) (remitting \$1.6 million punitive damage award to \$190,000 under *Gore* guideposts where plaintiff had prevailed on both state law and Title VII claims, with state claim not subject to cap and amount of applicable cap under Title VII not apparent from opinion).

A few federal cases have declared a punitive damages award under a statutory cap to be excessive, using the *Gore* guideposts, but stated that the court's review was for nonconstitutional excessiveness rather than constitutional excessiveness. *See Rubinstein*, 218 F.3d at 407 (stating that “a more fully developed approach to assessing the Constitutionality of a punitive damages award awaits a future day”); *Deffenbaugh-Williams*, 156 F.3d at 595 (characterizing *Gore* as “instructive” in evaluating defendant's non-constitutional excessiveness challenge and stating that it “will not develop in detail the three [guideposts] as will be necessary for a constitutional challenge”).

³²⁵ *See, e.g., Abner*, 513 F.3d at 160 (upholding \$125,000 punitive damages award for violation of Title VII and 42 U.S.C. § 1981 against due process challenge when no compensatory damages were awarded); *Cush-Crawford v. Adchem Corp.*, 271 F.3d 352, 359 (2d Cir. 2001) (upholding a \$100,000 punitive damages award under Title VII when no actual damages awarded); *EEOC v. Harbert-Yeargin, Inc.*, 266 F.3d 498, 515–16 (6th Cir. 2001) (stating that a \$300,000 punitive damages award complied with due process when only \$1 awarded in compensatory damages); *EEOC v. W&O, Inc.*, 213 F.3d 600, 616 (11th Cir. 2000) (upholding a punitive damages award under Title VII that represented a 8.3-to-1 ratio to compensatory damages); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1266, 1273 (10th Cir. 2000) (upholding a punitive damages award under Title VII that represented at 59-to-1 ratio to compensatory damages); *ASARCO*, 798 F. Supp. 2d at 1049 (upholding \$300,000 punitive damages award under Title VII when only nominal damages of \$1 awarded).

³²⁶ *Gore*, 517 U.S. at 582.

³²⁷ *See, e.g., Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1122 (9th Cir. 2008) (noting that higher ratio may be warranted by the need to deter future misconduct); *W&O*, 213 F.3d at 616 (asserting that the second *Gore* guidepost “requires a court to ask whether a relatively higher ratio of punitive to compensatory damages is permissible in order to effect the deterrent purposes behind punitive damages”).

punitive damages cases with accompanying nominal damages, a ratio-based inquiry becomes irrelevant.”³²⁸ The Second Circuit stated in a case upholding a \$100,000 punitive damages award, when neither actual nor nominal damages were awarded, that “the [employment discrimination] statutory maxima capping punitive damage awards strongly undermine the concerns [about unreasonable verdicts by juries] that underlie the reluctance to award punitive damages without proof of actual harm.”³²⁹ The reasoning of the Fifth and Second Circuits would seem also to lessen the importance of a ratio-based inquiry in reviewing an award of a bounded, legislatively created remedy.

I have argued that the doctrine of *Gore/Campbell* should not apply to congressionally created remedies because such remedies are functionally distinguishable in important ways from punitive damages. Even if this doctrine were to apply, the example of courts reviewing punitive damages awards subject to statutory caps shows that judicial deference to statutory maximums is prevalent and strongly influences the due process inquiry.

D. Aggregation of Multiple Awards within Statutory Range

A common occurrence with legislatively created remedies, fines, and sentences of imprisonment is that when the defendant has committed multiple statutory violations, the remedies or sanctions for those violations may add up to very large amounts. Aggregate awards of legislatively created remedies may occur when the defendant has committed multiple violations of the statute against a single plaintiff or several named plaintiffs. This was the situation in *Tenenbaum* and *Thomas-Rasset*, because the defendants had infringed multiple copyrighted works.³³⁰ Aggregate awards may also occur in the class action context, when a single type of statutory violation has affected many persons.³³¹

³²⁸ *Abner*, 513 F.3d at 164.

³²⁹ *Cush-Crawford*, 271 F.3d at 359.

³³⁰ Another example is an action in which a single plaintiff has received multiple unsolicited “junk” faxes from the defendant in violation of federal law. *See, e.g.,* *Pasco v. Protus IP Solutions, Inc.*, 826 F. Supp. 2d 825, 835 (D. Md. 2011) (in action under the Telephone Consumer Protection Act, noting defendant’s argument “that even if \$500–\$1,500 in statutory damages are constitutional, an aggregate award, taking account of hundreds of unsolicited faxes, could easily reach into the millions, and could therefore violate due process”).

³³¹ *See, e.g.,* *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (asserting “*cf.*” cite to *Campbell* and *Gore* for the proposition that “it may be that in a sufficiently serious case the due process clause might be invoked, not to prevent [class] certification, but to nullify that effect and reduce the aggregate damage award” under federal Cable Communications Policy Act, but finding that “these concerns remain hypothetical” because class had not yet been certified); *Green v. Anthony Clark Int’l Ins. Brokers*, No. 09 C 1541, 2010 WL 431673, at *6 (N.D. Ill. Feb. 1, 2010) (responding to defendants’ argument that if a class were certified, aggregated statutory damages would violate *Campbell*, by stating “[t]he appropriate time to deal with that issue is later, if and after a class is certified”).

Similarly, multiple fines or monetary penalties may be due the government for multiple statutory violations.

Under many federal statutes, such as the civil False Claims Act³³² or the Fair Credit Reporting Act,³³³ it is conceivable that a defendant might commit thousands of violations.³³⁴ Even if the lowest possible remedy or fine would be imposed per violation, the aggregate award could be enormous. For example, in one recent case under the False Claims Act, *United States ex rel. Kurt Bunk v. Birkart Globistics GmbH & Co.*,³³⁵ the defendants submitted 9,136 false claims to the federal government in the form of contract invoices; with a statutory minimum penalty of \$5,500 per false claim, the minimum total penalty would have been over \$50,000,000.³³⁶

Congress could act to avoid unduly harsh aggregated remedies or sanctions. Indeed, it has done so in several contexts. Sometimes, Congress has imposed an aggregate limit on remedies that it has created.³³⁷ In the sentencing context, Congress has created measures that give courts the power to lessen the length of imprisonment that is available for multiple criminal offenses. Congress has specified that multiple sentences of imprisonment imposed at the same time run concurrently unless the court orders, or the governing statute mandates, that the terms are to run consecutively.³³⁸ Federal courts have sometimes determined that multiple fines for multiple criminal offenses are to run concurrently, with the defendant only responsible to pay a single fine.³³⁹ The Federal Sentencing

³³² 31 U.S.C. § 3729 (2006).

³³³ 15 U.S.C. § 1681 (2006).

³³⁴ See, e.g., *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953–54 (7th Cir. 2006) (discussing potential class action with purported 1.2 million recipients of defendant's solicitations in violation of Fair and Accurate Credit Transactions Act, when statutory damages range per violation was \$100 to \$1000); *United States v. Bickel*, No. 02-3144, 2006 WL 1120439 at *1 (C.D. Ill. Feb. 22, 2006) (involving 39,949 false claims for Medicare and Medicaid payments in violations of the False Claims Act).

³³⁵ Nos. 1:02cv1168 (AJT/TRJ), 2012 WL 488256 (E.D. Va. Feb. 14, 2012).

³³⁶ The district court found the total sum unconstitutional under the Excessive Fines Clause and imposed no penalty. *Id.* at *4.

³³⁷ See, e.g., Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (2006) (“In the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of \$500,000 or 1 per centum of the net worth of the creditor.”); Fair Debt Collection Practices Act, 15 U.S.C. § 1692k(a)(2)(B)(ii) (2006) (same, except substituting “debt collector” for “creditor”).

³³⁸ 18 U.S.C. § 3584 (2006) (“Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively.”).

³³⁹ See, e.g., *United States v. Johnson*, 319 U.S. 503, 506 (1943) (noting that district court had imposed a \$10,000 fine for each of the five counts but that a payment of \$10,000 would discharge all fines); *United States v. Allison*, 264 F. App'x 450, 452 (5th Cir. 2008) (recounting that defendant was sentenced to a fine for each of six counts, “to run

Guidelines provide that all counts involving the same harm should be grouped together, lessening the possibility of consecutive sentences in some circumstances.³⁴⁰ Congress could take similar steps with respect to legislatively created remedies, permitting or requiring courts to treat multiple awards for multiple, similar offenses as concurrent.

Assuming that Congress has not limited the possibility of very large aggregated awards of legislatively created remedies, the question becomes whether such awards might be considered excessive under due process when the amount per statutory violation is itself constitutional. The Supreme Court has not had the occasion to determine whether an aggregated award of fines, legislatively created remedies, or punitive damages in a given case would result in a total so excessive as to violate the Constitution. In *Williams*, the Court announced its “wholly disproportioned to the offense” standard in the context of deciding whether a statutory remedial provision on its face violated due process.³⁴¹ In *Bajakajian*, the Court adopted its “grossly disproportional to the gravity of the offense” standard under the Excessive Fines Clause in reviewing a single asset forfeiture.³⁴² In setting and applying guidelines for whether awards of punitive damages are grossly excessive under due process, the Supreme Court has reviewed single awards.

Some commentators have argued that aggregated “statutory damages” warrant review under *Gore/Campbell*—whether in the plaintiff class action context or the context of a single plaintiff alleging numerous violations of the same statute.³⁴³ A few lower courts have mentioned the possibility that statutory damages awarded in a class action might be subject to review under *Gore/Campbell*, without deciding the issue because of ripeness concerns.³⁴⁴

concurrently”); *United States v. Canova*, 412 F.3d 331, 343 (2d Cir. 2005) (detailing that the district court imposed a \$1,000 fine for each of four counts, “to run concurrently”).

³⁴⁰ See U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 (2011); 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, *FEDERAL PRACTICE & PROCEDURE CRIMINAL* § 551 (4th ed. 2011) (stating that the grouping provisions of “the Guidelines seek ‘to provide incremental punishment for significant additional criminal conduct’ by providing some sentence enhancement yet at the same time avoiding multiple punishment for ‘substantially identical offense conduct’” (footnote omitted)); Kristen Orr, *Fencing in the Frontier: A Look into the Limits of Mail Fraud*, 95 KY. L.J. 789, 808 (2006–2007) (acknowledging that Sentencing Guidelines are not mandatory, but that “the grouping of counts alleviates the length of a sentence”).

³⁴¹ See *supra* notes 203–17 and accompanying text.

³⁴² See *supra* notes 237–45 and accompanying text.

³⁴³ See, e.g., *Barker*, *supra* note 18, at 536–59 (arguing that *Gore* due process review should apply when multiple statutory damages are aggregated); Scheuerman, *supra* note 18, at 131–51 (arguing that *Gore* due process review should apply to statutory damages awards in class actions).

³⁴⁴ See, e.g., *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (in actions for violations of the federal Fair Credit Reporting Act, citing *Campbell* for the proposition that “[a]n award [of statutory damages] that would be unconstitutionally excessive may be reduced” but adding that “constitutional limits are best applied after a class has been certified”); *Aliano v. Caputo & Sons*, No. 09 C 910, 2011 WL 1706061, at *4

For reasons offered in Part IV.C, whether an award of legislatively created remedies is excessive under due process should not be informed by doctrine developed to address jury awards of uncapped punitive damages. This suggestion applies whether the context is a single award or aggregated awards. As discussed in Part IV.A, apparently no federal court, prior to the district court in *Thomas-Rasset*, had found an award of a legislatively created remedy to violate the *Williams* “wholly disproportioned to the offense” due process standard. Many cases upheld large aggregate awards for multiple statutory violations.³⁴⁵ These results are consistent with doctrine and precedents addressing aggregation of punitive sanctions created and delimited by Congress—fines and prison terms.

As described in Part IV.B, apparently no federal appellate court has held that a traditional fine within legislative monetary boundaries—i.e., not an asset forfeiture—was unconstitutional under the Excessive Fines Clause. The federal appellate courts have confronted many instances when relatively small fines have totaled large sums because of multiple violations of the statute, yet no decision found the total amount to violate the Clause.³⁴⁶ The appellate courts simply have not found aggregation to present a unique constitutional issue. Consider the following statement by the 11th Circuit, which upheld \$700,000 in

(N.D. Ill. May 5, 2011) (stating in class actions under the Fair and Accurate Credit Transactions Act that “the Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case . . . would not violate Defendant’s due process rights” (citing *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 429 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586 (1996))); *In re Napster, Inc. Copyright Litig.*, No. CMDL-00-1369 MHP, 2005 WL 1287611, at *11 (N.D. Cal. June 1, 2005) (stating that “the excessiveness of statutory damages awards cannot be judged in the abstract” in the class certification process, but adding that “[t]he factors that the court would consider in making such a determination are similar to the ‘guideposts’ that the Supreme Court has identified in the context of reviewing the reasonableness of a jury award” (citing *Campbell*, 538 U.S. at 418; *Gore*, 517 U.S. at 575)).

³⁴⁵ See *supra* note 224.

³⁴⁶ See, e.g., *Moustakis v. City of Fort Lauderdale*, 338 F. App’x 820, 822 (11th Cir. 2009) (upholding \$700,000 total fine based on daily fines of \$150 over fourteen years for homeowners’ failure to correct housing code violations when house was worth only \$200,000); *Korangy v. U.S. FDA*, 498 F.3d 272, 277–78 (4th Cir. 2007) (upholding penalty of \$3,000 for each of 386 mammograms performed after certification had lapsed for a total of approximately \$1 million); *Qwest Corp. v. Minn. Pub. Utils. Comm’n*, 427 F.3d 1061, 1069–70 (8th Cir. 2005) (upholding total fine of \$25 million for reporting violations under the federal Telecommunications Act based on daily fines of \$10,000 and \$2,500); *United States v. Gurley*, 384 F.3d 316, 325 (6th Cir. 2004) (upholding daily fines totaling almost \$2 million over a period of seven years for defendant’s willful failure to respond to EPA information requests); *San Huan New Materials High Tech, Inc. v. Int’l Trade Comm’n*, 161 F.3d 1347, 1364–65 (Fed. Cir. 1998) (upholding \$1.55 million in total fines for unfair practices in import trade based on per violation per day fines of \$50,000 for a total of \$1.55 million); cf. *Nat’l Taxpayers Union v. U.S. Soc. Sec. Admin.*, 302 F. App’x 115, 120–21 (3d Cir. 2008) (upholding penalty of \$.50 per direct mail piece for a total amount \$ 274,582 under a statute that allowed a penalty of up to \$5,000 per offending piece of mail because it did not fall within the Excessive Fines Clause as it was neither a “fine” nor “excessive”).

total fines (based on daily fines of \$150) against the owners of a \$200,000 home for failing to bring their house into municipal code compliance: “Rather than being grossly disproportionate to the offense, the \$700,000 fine is, literally, directly proportionate to the offense.”³⁴⁷

With respect to criminal sentencing (outside the contexts of capital offenses and offenses committed by juveniles), the Supreme Court has indicated that “successful challenges to the proportionality of particular sentences should be exceedingly rare.”³⁴⁸ This is largely because of the deference due the legislature’s policy choices. The Court has, however, suggested that the proportionality principle “would . . . come into play in the extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment.”³⁴⁹ This hypothetical presents a complete lack of proportionality between the severity of the penalty and the offense—similar to the disproportionality between the severity of forfeiting over \$300,000 in currency to Bajakajian’s reporting offense.

Consider the following aggregation twist to the Court’s parking hypothetical. Assuming that a day in jail for a single overtime parking violation is itself constitutional, would dozens of overtime parking violations produce a total sentence so excessive that it would violate the Eighth Amendment Cruel and Unusual Punishment Clause? Based on precedent, the answer would seem to be “no.” Thus far, excessiveness challenges to the total length of jail time for multiple offenses running consecutively have been unsuccessful.³⁵⁰ The federal courts typically reason that as long as the sentence imposed for each offense was within the limits of the relevant statute, the total sentence is not cruel or unusual or unconstitutionally excessive.³⁵¹

If aggregated jail time for multiple offenses will rarely, if ever, run afoul of the Constitution, then may aggregated legislatively created remedies or fines for

³⁴⁷ *Moustakis*, 338 F. App’x at 822.

³⁴⁸ *Ewing v. California*, 538 U.S. 11, 22 (2003).

³⁴⁹ *Id.* at 21.

³⁵⁰ I constructed a query at <http://www.lexis.com> in the U.S. Courts of Appeals, Combined database for: (consecutive w/4 sentenc!) w/12 (Eighth or cruel or due process), and I did not find a case holding that consecutive sentences imposed were so excessive as to violate the Eighth Amendment Cruel and Unusual Clause, or due process (query last performed July 12, 2012). See also *Cumulative or Consecutive Sentences*, 33 A.L.R.3d 335, § 12, 372–75 (1970) (summarizing cases that reject Eighth Amendment challenges to cumulative or consecutive sentences); cf. *United States v. Parker*, 241 F.3d 1114, 1117 (9th Cir. 2001) (deciding that mandatory consecutive sentences imposed under 18 U.S.C. § 924(c)(1) do not violate the Eighth Amendment).

³⁵¹ See 33 A.L.R.3d 335, § 12, 372–75 (1970).

multiple offenses be unconstitutionally excessive?³⁵² I suggest that in very rare circumstances, the answer may be “yes.” I return to the conclusions that I drew from the Excessive Fines Clause precedents: (1) close judicial scrutiny of a penalty imposed in a particular case is warranted when Congress authorized a severe penalty for many types of offenses and the types of offenses vary substantially in seriousness, and (2) with respect to traditional monetary fines, courts usually presume that Congress created penalty ranges that are proportional to the proscribed conduct.³⁵³ From these conclusions, I suggest that when a defendant committed multiple offenses that are at the less serious end of a wide spectrum of statutorily proscribed conduct and the per-offense statutory penalty is severe, it may not be appropriate for a court to presume that Congress created a scheme that satisfies the constitutional requirement of proportionality. The court might instead consider whether the defendant’s culpability or the plaintiff’s or public’s harm increased in linear fashion with each statutory violation; in the absence of linear increase in culpability or harm, the aggregate award might be unconstitutionally excessive.

Consider the civil False Claims Act, which covers a wide variety of representations made to the federal government.³⁵⁴ The statute imposes a severe penalty—a mandatory minimum of \$5,500 per false claim.³⁵⁵ The mandatory minimum per false claim means that the aggregated fine increases in linear

³⁵² With respect to aggregated legislatively created remedies, it is interesting to compare the perspectives of two district courts considering possible unconstitutional excessiveness. Judge Gertner in *Tenenbaum* commented:

Someone who illegally downloads 1,000 songs may be more blameworthy than an individual who illegally downloads only one, but it seems odd to say that his conduct is 1,000 times more reprehensible. Section 504(c) ignores this issue entirely, providing the same statutory damages ranges for each infringed work no matter how many works are infringed. Consequently, the aggregation of statutory damages awarded under section 504(c) may result in unconscionably large awards.

Tenenbaum I, 721 F. Supp. 2d 85, 115 (D. Mass. 2010).

By contrast, in certifying a class action in one of the Napster music sharing cases, a district court questioned why statutory damages in class actions should be singled out for due process scrutiny:

In the absence of any theory to explain why the amount of statutory damages awarded would expand faster than the size of the class, the assumption that class action treatment exacerbates concerns about excessive damages awards is either a product of mathematical error or based on the assumption that defendants who injure large number [sic] of individuals are less culpable than those who spread the effects of their unlawful conduct less widely.

In re Napster, Inc. Copyright Litig., No. CMDL-00-1369 MHP, 2005 WL 1287611, at *11 (N.D. Cal. June 1, 2005).

³⁵³ See *supra* notes 276–77 and accompanying text.

³⁵⁴ 31 U.S.C. § 3729 (2006).

³⁵⁵ *Id.* § 3729(a)(7).

fashion with each false claim. However, hundreds or thousands of false claims may have been committed—varying in terms of seriousness—without the defendant’s culpability or the government’s or public’s harm seeming to increase linearly. In these circumstances, it may be appropriate for a court to find the aggregated penalty to be unconstitutionally excessive.

Birkart Globistics is illustrative. The court said of the minimum \$50 million aggregated statutory penalty applicable on the facts of the case: “[T]here is nothing in the language Congress adopted in the [Act] that suggests that Congress ever contemplated that civil penalties would be imposed at the level required here under facts similar to this case.”³⁵⁶ Noting that the government did not incur any demonstrable damages, the district court found that the total penalties would be “grossly disproportional to the harm caused by the [d]efendants” and thus in violation of the Excessive Fines Clause.³⁵⁷

What, then, of aggregated awards of legislatively created remedies, which are subject to due process review rather than review under the Excessive Fines Clause? I suggest that, similar to my analysis under the Excessive Fines Clause, an aggregated award may violate due process even if the amount per statutory violation does not. A reviewing court should consider whether the statute authorizes a substantial remedy for a wide variety of offenses, whether the defendant’s offense was at the less serious end of the spectrum of offenses, and whether the defendant’s culpability and the plaintiff’s or public’s harm did not increased linearly with each statutory violation.

Returning to *Thomas-Rasset* and *Tenenbaum* as examples, the liability and remedial provisions in the Copyright Act are relatively narrow and well-tailored when compared to the criminal forfeiture statute involved in *Bajakajian*³⁵⁸ or to

³⁵⁶United States *ex rel.* Bunk v. Birkart Globistics GmbH & Co., Nos. 1:02cv1168 (AJT/TRJ), 2012 WL 488256, at *10 (E.D. Va. Feb. 14, 2012). The United States, in a case involving 32,949 false billings submitted to Medicare and Medicaid, itself took the position that the minimum total civil penalty for all the claims (\$180 million) would violate the Excessive Fines Clause. United States v. Bickel, No. 02-3144, 2006 WL 1120439, at *3 (C.D. Ill. Feb. 22, 2006). The government sought a civil penalty of only \$11,000 in addition to treble damages of over half a million dollars. *Id.* at *4. The defendant had already been sentenced to 60 months imprisonment and ordered to pay more than \$2 million in restitution. *Id.*

³⁵⁷*Birkart Globistics*, 2012 WL 488256, at *11. The court also determined that it had no authority to impose a penalty less than that mandated by the statute and thus imposed no penalty at all. *Id.* Other courts have assumed they do have the power to impose penalties less than that mandated by a statute if the mandatory minimum fines would violate the Excessive Fines Clause. See *id.* (citing United States *ex rel.* Koch v. Koch Indus., Inc., 57 F. Supp. 2d 1122, 1145 (N.D. Okla. 1999), United States v. Advance Tool Co., 902 F. Supp. 1011, 1018–19 (W.D. Mo. 1995), and United States *ex rel.* Smith v. Gilbert Realty Co., Inc., 840 F. Supp. 71, 75 (E.D. Mich. 1993)). The Supreme Court in *Bajakajian* expressly refused to consider “whether a court may disregard the terms of a statute that commands full forfeiture” and then impose forfeiture in a lesser amount. United States v. Bajakajian, 524 U.S. 321, 337 n.11 (1998).

³⁵⁸See *supra* notes 237–59 and accompanying text.

the False Claims Act.³⁵⁹ The direct economic harm to the recording companies, small though it was, did increase linearly with each song that was downloaded but not purchased. None of the aggregated awards in *Thomas-Rasset* and *Tenenbaum* rose to the level of the gross mismatch between penalty and defendant culpability/plaintiff harm that *Bajakajian* or *Birkart Globistics* presented. Finally, the total amounts for the multiple songs infringed pale in comparison to the large aggregated fines and lengthy prison sentences that federal courts routinely have upheld. Thus, I suggest that the aggregated awards in *Thomas-Rasset* and *Tenenbaum* did not violate due process.

A reviewing court's determination whether an award of a congressionally created remedy is excessive under due process should be informed by the deference due to Congress in creating the cause of action, the remedy, and the monetary range for the remedy. By analogy to the deferential manner in which federal courts have evaluated penalties under the Excessive Fines Clause, it should be rare that a reviewing court will deem a legislatively created remedy to be "wholly disproportionate" to the statutory offense. Presumably (but not irrebuttably), Congress incorporated proportionality when it created and bounded monetary remedies for statutory violations.

However, when Congress has authorized or required a severe remedy or penalty for many types of offenses, with the types of offenses varying substantially in terms of seriousness, a reviewing court perhaps owes less deference to Congress when the actual violation is at the low end of the seriousness spectrum. The possibility of unconstitutional disproportionality between the remedy or penalty and the actual offense becomes heightened in such a circumstance. Moreover, if the defendant has committed multiple statutory offenses, the amount of aggregated remedies or penalties may be constitutionally suspect if the defendant's culpability and the plaintiff's and public's harm did not increase linearly with each statutory violation.

V. CONCLUSION

When a federal jury or trial judge has assessed the amount of a monetary remedy created and bounded by Congress, judicial review for excessiveness should be more circumscribed than when a jury or judge has assessed the amount of a judicially created remedy. Nonconstitutional review of an award of a congressionally created remedy should be limited to whether the award is consistent with the relevant statutory language. If Congress enacted factors to guide the trial decisionmaker's choice of amount within the monetary boundaries set by the statute, then a reviewing court may consider whether the amount of the award is unreasonable in light of those factors. If Congress has not legislated factors to guide the selection of amount within the statutory range,

³⁵⁹ See *supra* notes 354–57 and accompanying text.

then the trial decisionmaker's choice of amount within the range should not be reviewed for excessiveness. In the absence of statutory factors, judicial review for excessiveness would subvert the remedial authority of both Congress and the trial decisionmaker.

With respect to constitutional review, federal courts may consider whether an award of a legislatively created remedy is wholly disproportioned to the defendant's offense and thus a violation of due process. In this evaluation, courts should give appropriate deference to congressional judgments creating the cause of action, the remedy, and the monetary boundaries of the remedy. Courts should apply the due process standard as leniently as they have applied a practically identical standard under the Excessive Fines Clause.

It may be, as a matter of sound policy, that some legislatively created remedies should be more finely tuned so as to avoid harsh results. The source of any fine tuning, however, should be Congress, which can choose to enact gradations to statutory ranges, factors to inform the selection of awards within statutory ranges, or limits on aggregate awards for multiple statutory violations. Subject to constitutional constraints, curing "excessive" awards of legislatively created remedies is the job of Congress, with courts having the power to review only whether an award is consistent with the relevant statutory language.